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Supreme Court, U.S.
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In the Supreme Court of the United States

DAWN V. MARTIN, ESQUIRE,
Petitioner,

v.

HOWARD UNIVERSITY,
HOWARD UNIVERSITY LAW SCHOOL
AND
ALICE GRESHAM BULLOCK, ESQUIRE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Since 80% of stalking victims are women, should a disparate impact theory of discrimination be applied to find that workplace/campus stalking constitutes sexual harassment, pursuant to Title VII of the Civil Rights Act of 1964?

2) Where a woman is sexually harassed in her workplace by a non-employee, what "magic words" must she use in order to be protected from retaliation, as guided by EEOC Regulation 29 CFR § 1604.11(e)?

3) Must a plaintiff prove that she was "groped" or "touched" to prevail on a claim of sexual harassment?

4) Is harassment "based on sex" when the harasser uses gender-specific language, referring to the victim as his "*wife*?"

5) Where a stalker selects his *female* victim because she fits the "profile" of a fictitious *female* character, is the harassment "gender profiling," using a "sex-plus" analysis?

6) Where an employer cancels an advertised job vacancy, and leaves additional vacancies unfilled to avoid consideration of an applicant/employee who has complained of sexual harassment, does this conduct constitute actionable retaliation under Title VII, as defined by *Burlington Northern v. White*, 548 U.S. 53 (2006)?

7) Can a defendant escape liability in a Title VII retaliation case by admitting to *age discrimination* in its closing argument, without subjecting itself to a

claim under the Age Discrimination in Employment Act (ADEA)?

8) Under what circumstances should the court order a Title VII plaintiff to pay the litigation costs of the defendant?

9) Can a magistrate judge, *sua sponte*, dismiss a previously upheld claim where the Defendant never challenged the validity of that claim, as a matter of law?

10) Can the tort of "wrongful termination," in violation of public policy, be applied where an employee is terminated for reporting stalking in the workplace?

11) Can a plaintiff establish a claim of intentional infliction of emotional distress where an employer subjects her to a workplace stalker, lies about its efforts to ban the stalker from the workplace, and retaliates against the stalked employee by terminating her employment?

12) May a court place a decision on a plaintiff's motion for mandatory Rule 37 sanctions – in excess of $364,000 -- in indefinite abeyance and close the case without deciding it?

13) Where the court publishes a decision that relies on testimony that it ordered *excluded*, and that disputed testimony is harmful to plaintiff's professional reputation, may the court deny the plaintiff's *unopposed* motion to vacate it?

14) Does a court violate due process, the law of the case and/or Rule 56(d)(1) where it established facts and identified jury questions pre-trial, but post-trial, submitted a previously decided material question of fact to the jury?

15) Does a judge unduly prejudice a jury against a *pro se* party, by ordering her to talk to herself on the witness stand and speak of herself in the third-person, particularly where the court has excluded admissible evidence that would have enhanced her credibility?

16) Does perjury constitute a "fraud" upon the court and require vacating a jury verdict, pursuant to Rule 60(b)(2)?

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U.S. Court of Appeals for the D.C. Circuit

1) **March 31, 2008 Decision:** 2008 WL 1885434 (D.C. Cir. 2008) (A-1): affirmed District Court's decisions.

2) **May 20, 2008 Order** (A-13): denied rehearing *en banc*.

3) **March 31, 2008 Order** (A-14): denied Ms. Martin's motion for sanctions against Howard for misrepresentations of the record in its Brief.

4) **April 7, 2008 Order** (A-15): denied Ms. Martin's motion for sanctions against Howard and its counsel for misrepresentations of the record in Oral Argument.

5) **April 11, 2008 Order** (A-16): denied Ms. Martin's motion for reconsideration of April 7, 2008 Order and instructed Clerk to reject motions for sanctions from her.

6) **June 4, 2008 Mandate.** (A-17)

U.S. District Court for the District of Columbia

7) ***Martin v. Howard University,*** 1999 U.S. Dist. LEXIS 19516, 1999 WL 1295339; 81 Fair Empl. Prac. Cas. (BNA) 964; 15 I.E.R. Cas. (BNA) 1587 (D.D.C. 1999) (A-19): a) adopted EEOC Regulation 29 CFR § 1604.11(e), holding that, pursuant to Title VII, employers are liable for the sexual harassment of employees by non-employees if they knew or should have known of the harassment and failed to take reasonable steps to end it (A-24-25); b) held "it is clear that Prof. Martin was only the object of Harrison's attention because she was a female" (A-27); c) identified jury questions on sexual harassment claim as: (1) whether the harassment was severe and pervasive, creating a hostile work

environment (A-29-30), and (2) whether Howard took reasonable steps to end it (A-30); d) upheld retaliation claims (A-30-33); c) upheld breach of contract claim (A-35-38); and e) dismissed intentional infliction of emotional distress claim (A-34).

8) **May 31, 2001 Decision** (A-39): a) granted, in substantial part, Ms. Martin's motions to compel discovery; b) held plaintiff's motions for Rule 37 sanctions against Howard in abeyance (A-61, 66, 70).

9) **May 23, 2002 Decision,** 204 F. Supp. 1 (D.D.C. 2002) (A-71): magistrate referred Contempt of Court proceedings against Howard to Judge Hogan.

10)**June 27, 2002 Decision** (A-78): held Howard in Contempt of Court for discovery violations that delayed litigation by several years.

11)**September 24, 2002 Order** (A-80): precluded Howard from using Prof. Gavil's testimony in summary judgment motions.

12)**Magistrate Facciola's *Report and Recommendation*,** 2003 U.S. Dist. LEXIS 18501 (D.D.C. 2003) (A-83): a) reiterated Judge Hogan's 1999 holding that Harrison stalked Prof. Martin "based on her sex" (A-87); b) recommended denying both parties' cross-motions for summary judgment, except to dismiss, *sua sponte*, retaliation claims based on cancellation of vacancies, deemed not to be "adverse actions" (A-107-111); c) denied cross-motions on the breach of contract claim, stating that Judge Hogan dismissed the claim in 1999 (A-111);[1] d) claimed that both parties failed to file Rule 56.1

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[1] Judge Hogan actually upheld the claim. (A-35-36, 115).

Statement of Disputed Material Facts, so he would "divine" the disputed facts[2] (A-84-86).

13)**September 16, 2005 Order** (A-113): adopted MJ Facciola's October 20, 2003 *Report and Recommendation*.

14)**October 21, 2005 Order** (A-114): corrected two misrepresentations in MJ Facciola's *Recommendation* (1) that Judge Hogan dismissed breach of contract claim in 1999; and (2) that neither party filed a Rule 56.1 *Statement of Disputed Material Facts*.

15)**January 10, 2006 Order** (A-116): limited retaliatory non-renewal claims to rejection for the EEO/Labor position, made on December 18, 1997.

16)**March 30, 2006 Order** (A-120): redefined limits of retaliation claims.

17)**March 31, 2006 Order** (A-122): reaffirmed dismissal of retaliation claims.

18)**April 28, 2008 Jury Note** (A-126): requests instruction

19)**April 28, 2008 Jury Verdict** (A-127)

20)**August 21, 2006 Order** (A-137): taxed Howard's litigation costs to Ms. Martin.

21)***Martin v. Howard University***, 2006 WL 2850656 (October 4, 2006) (A-138): a) denied both parties' post-trial motions for judgment as a matter of law; b) found sufficient evidence that the stalker's conduct did not constitute sexual harassment because: (1) the stalker did not engage in behavior that is "typical" of sexual harassment cases, like "groping" or "touching" (A-146); (2) Prof. Martin's

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[2] Ms. Martin *did* file a *Statement of Material Disputed Facts*. (A-114-115) Howard failed to file one, but Judge Hogan excused its non-compliance. *Id.*

entitled some memoranda *"Security Problem on Campus"* (A-164, 175, 178); and 2) the stalker "stalked"[3] a male professor at another University (A-146).

22)**January 3, 2007 Order**: rejected *Plaintiff's Opposition to Howard's Bill of Costs* (A-159);

23)**January 23, 2007 Order**: denied *Plaintiff's Motion for Reconsideration of January 3, 2007 Order* (A-161).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and Supreme Court Rules 10(a) and (c), with pendant jurisdiction over state claims, pursuant to 28 U.S.C. § 1332. *Martin* presents issues of national importance, particularly with respect to workplace violence, campus violence and stalking, which primarily victimizes women. The D.C. Circuit's March 31, 2008 decision (rehearing *en banc* denied May 29, 2008) creates a split in the circuits regarding several civil rights issues. It requires interpretations of Title VII of the Civil Rights Act of 1964, particularly sexual harassment, retaliation and assessing defendant's litigation costs against plaintiffs.

STATUTES AND REGULATIONS

See Appendix.

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[3] Harrison's one-time confrontation with Prof. Derrick Bell did not constitute stalking. See V,E,4.

STATEMENT OF THE CASE

Facts.[4] Dawn Martin was a law professor at Howard University from July 1996 through June 1998. She taught Equal Employment Opportunity (EEO) law and other courses for four years. Prior to teaching, she served as a trial attorney with the U.S. Department of Justice, Civil Rights Division (Honors Program), the New York State Office of the Attorney General, Civil Rights Bureau, and as a Special Assistant to Commissioner Tucker at the Equal Employment Opportunity Commission (EEOC).[5] Prof. Martin helped develop national policy and published in the area of EEO law. She graduated from Columbia University (1978) and New York University School of Law (1981).

Howard recruited Prof. Martin from a tenure-track position at Cleveland-Marshall College of Law to begin with Howard as a "Visitor." Howard promised that it would be converted to a tenure-track position as soon as one became available. Prof. Martin received excellent student evaluations. The Dean consistently awarded her summer grants based on her satisfactory progress in scholarship.

Beginning on November 20, 1997, Prof. Martin was harassed on campus by a delusional, homeless, serial stalker with a criminal record, Leonard Harrison. Harrison roamed freely through Howard Law School buildings, leaving Prof. Martin letters under her office door, messages on her voicemail and visiting her office. He stated that he was pursuing Prof. Martin to become his "wife." He described this "*natural wife*" as the physical embodiment of a

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[4] The 1999 opinion details the facts. (A-20-22, 26-27, 28-30, 31-32).

[5] She received "outstanding" evaluations.

fictitious female character, Geneva Crenshaw, in a book, written by NYU professor, Derrick Bell, *And We are Not Saved.* (A-184-190) His letters discussed other women that he had pursued, indicating that he was a serial campus stalker of African-American women teaching civil rights and "race" courses.

Prof. Martin immediately reported Harrison's conduct to the Dean's office.[6] The Associate Dean refused to assist her, but suggested that she call the police on her own. Prof. Martin enlisted a campus police officer who attended the meeting with the police and took a campus police report. The D.C. Metropolitan Police Department (MPD) characterized Harrison's harassment as "stalking," pursuant to D.C. Code § 22-404 (b) and processed her criminal complaint. MPD advised Howard to ban Harrison from campus and hold him for arrest if he returned.

On November 25, 1997, Harrison was escorted off campus based on a student complaint, but was not barred or held for arrest. Prof. Martin therefore wrote her first memo to Dean Bullock detailing Harrison's conduct, again asking the administration to bar Harrison from the law school. (A-164) Dean Bullock responded in writing, stating that she was discussing the matter with the Director of Campus Security, Lawrence Dawson (A-177).[7] Harrison

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[6] A-164, 175, 178, 184.

[7] Contrary to Howard's 1998 response to the EEOC (A-172), and its 2001 Answers to Interrogatories, Mr. Dawson and Dean Bullock's 2002 depositions revealed that Dean Bullock *never* discussed the stalking with Mr. Dawson or any other member of Howard's Campus Security Force. Bullock deposition at 48:5:-64:4 (**JA**6,278-6,289); Tr. 426:20-434:25 (**JA**11,220-11,228); 658:4-665:25 (**JA**11,459).

continued to enter the law school and confronted Prof. Martin in her office on December 1, 1997. (A-175) Harrison was chased off campus, but still *not* barred from campus. (A-178-181)

In a July 1, 1998 internal University memorandum, Dean Bullock expressly acknowledged that both she and Associate Dean Newsom perceived Harrison as a threat to Prof. Martin and "*other women*" whom he might "*stalk or otherwise harass*" on campus. (A-196)

Shortly before the Appointments ("APT") Committee's decision, Dean Bullock told Prof. Andrew Taslitz, the Committee Vice Chair, that she was having a "bad day" because she had just received Prof. Martin's memorandum regarding the stalking and had "a lot to do" with respect to it.

In fact, Dean Bullock did *absolutely nothing* with respect to the stalking. Instead, she engaged in private discussions regarding Prof. Martin's continued employment. She told Dean Newsom that *she* had decided not to select Prof. Martin for a permanent position; yet, APT Committee members testified that the Committee is an independent body and it would be *improper* for the Dean to influence its decisions.

On December 18, 1997, less than a month after the stalking began, Howard rejected Prof. Martin for the advertised tenure-track position teaching (EEO) law -- a course she had been teaching at Howard for two years. She was replaced by a less experienced, lower ranked, Visiting *Assistant* Professor who had never taught EEO law and who was then publishing her *first* article.

No fewer than eighty (80) law students sent letters and/or signed petitions praising Prof. Martin

as a professor and protesting her non-renewal. Dean Bullock ignored their protests. She left positions vacant while students protested the shortage of courses and professors. In her Answer to the Complaint ¶¶313, 326, Dean Bullock admitted that, as of May, 1998, there were *at least three vacant faculty positions for which Prof. Martin was "well qualified;"* but Dean Bullock *lied* to an APT Committee member, Prof. Nolan, telling her there were no vacant positions for which Prof. Martin could be considered. Dean Bullock also told Prof. Martin that she could not even be renewed for one more year because there were no "Visitorships" available.

Dean Bullock even withheld from the APT Committee information that the advertised Civil Rights/Constitutional Law position was still unfilled. When Prof. Martin learned of this vacancy from an outside source, she reapplied for it. (A-191) Prof. Martin was the only candidate for the position during the spring of 1998. Bullock immediately responded by converting the Civil Rights position to a tax position. Non-tenured professors – whether they are tenure-track or visitors – must have their contracts renewed each year. Although "non-renewal" has less of a stigma than a "firing," the practical effect is the same -- the employee loses her job.[8]

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[8]*Walker v. Board of Regents of University of Wisconsin System*, 300 F. Supp. 2d 836, 853 (W.D Wis. 2004), another case against a University with employees holding renewable contracts, held: "Whether this action is considered a termination or a refusal to re-hire, I conclude that it is a cognizable injury for the purpose of ...Title VII." Accord *Silk v. City of Chicago*, 194 F.3d 788, 800 (7th Cir.1999), *citing, inter alia, Delaware State College v.*

Because Howard rejected her application after the "hiring season" had ended, Prof. Martin was unable to secure another teaching position for the following year. Her teaching career therefore ended in June of 1998.[9]

Dean Bullock expressed resentment toward Prof. Martin because she was stalked and even *mocked* her requests for protection to the EEOC investigator:

> Martin did not seem satisfied with my response. I was left with the impression that she wanted me to wrestle the stalker down.[10]

On May 14, 1999, Ms. Martin filed this action, pursuant to Title VII of the Civil Rights Act of 1964 and the D.C. Human Rights Act, alleging sexual harassment/hostile work environment and retaliation, as well as the common law claims of breach of contract and intentional infliction of emotional distress. A jury returned a verdict for Howard. The Court of Appeals affirmed; however,

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Ricks, 449 U.S. 250 (1980). *See also Mintz v. District of Columbia,* 2006 U.S. Dist. LEXIS 34446 at *12-13 (D.D.C. 2006). *See also* fn. 32.

[9] The circumstances of Prof. Martin's departure from Howard – and the district court's October 20, 2003 published decision (A-83) -- have impeded her efforts to gain comparable employment. As a 41 year old single mother in 1998, Ms. Martin was forced to begin her career anew. She established a solo civil rights practice. Her income is sporadic, dependent largely on winning cases and collecting judgments. Had she remained at Howard, she would have been eligible for tenure the following year and would have met Howard's written requirements.

[10] Tr. 1092:7-1093:2 (JA11,885-11,886).

these decisions were based on egregious errors of law and fact.

The Jury Verdict

The jury answered a series of questions for each of Prof. Martin's claims:
(A-127)

1. Did the Plaintiff prove by a preponderance of the evidence that:

a) Mr. Harrison subjected her to conduct that was sufficiently severe and pervasive to alter the terms and conditions of her employment?

__X__ YES _____ NO

b) Mr. Harrison's conduct was unwelcome?

__X__ YES _____ NO

c) Mr. Harrison's conduct was sexual in nature or because of Plaintiff's gender?

_____ YES __X__ NO

d) Howard University knew or should have known of the alleged conduct?

__X__ YES _____ NO

e) Howard University failed to take proper remedial action that was reasonably calculated to end the harassment?

__X__ YES _____ NO

Because the jury found that Harrison's harassment was not based on sex/gender, Prof.

Martin's complaints did not meet the legal definition of "legally protected activity" under Title VII. There is no federal statute that explicitly protects an employee from being fired for being stalked. The jury therefore never reached the questions of whether Howard had a legitimate, non-retaliatory reason for her non-renewal (Verdict Questions #6 and 7, left blank, A-130-131)

REASONS FOR GRANTING THE WRIT

I. *Martin* Squarely Presents the Issue of whether Women can be Fired for being Stalked in the Workplace

A. The Policy of Terminating Stalking Victims has Disparate Impact on Women

The D.C. Circuit held:

> We need not decide whether and under what circumstances stalking might amount to harassment "based on gender." Rather, we merely hold that on the facts of this case, the jury's verdict must stand.

(A-8)

If stalking does not constitute sexual harassment on the facts of *this case*, it is difficult to imagine a fact pattern qualifying for Title VII protection. Prof. Martin was doing nothing more than "*working while female*" as a law professor at Howard University.

In effect, the D.C. Circuit *has* decided that stalking, *per se*, is not based on gender and that an employee can therefore be fired for being stalked. The *National Association of Women Lawyers* ("NAWL") filed an *Amicus Curiae* Brief in the D.C.

Circuit because this case sets precedent for all stalking victims -- eighty-percent (80%) of which are women.[11] If this case is not reversed, any woman at work *or on a campus* may be targeted by an obsessed stalker and fired for reporting it.

In 1999, Judge Hogan acknowledged Ms. Martin's argument that "stalking is primarily a crime against women, with sexual connotations." (A-27). Even when conduct affects both men and women, the conduct may constitute discrimination on the basis of sex if it disproportionately affects women. *Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977) (height and weight requirements); *Lynch v. Freeman*, 817 F.2d 380 (6th Cir. 1987) (unsanitary portable toilets). *Kopp v. Samaritan Health Sys., Inc.,* 13 F.3d 264, 269 (8th Cir. 1993) (harassment affected "*primarily women*").

Ms. Martin has established a *prima facie* case of sex discrimination under Title VII because the effect of firing or otherwise punishing stalking victims has a disparate impact on women. The burden should now shift to the employer to demonstrate that the practice is job related and consistent with business necessity. *Griggs v. Duke Power Co.,* 401 U.S. 424, 431-432 (1971). In order to defeat her *prima facie* case, Howard would have to demonstrate that it had a job-related business necessity for failing to renew Prof. Martin's contract -- while leaving positions vacant for which, Howard admits, she was well qualified.

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[11] Bureau of Justice Statistics, *National Crime Victimization Survey, Violence in the Workplace,* 1993-1999 (December 2001), at www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf; *Workplace Stalking*, published by the *U.S. Department of Justice*, 2002.

It is not clear whether Judge Hogan adopted the disparate impact theory to conclude "it is clear" that the stalker's harassment of Prof. Martin was because of sex. In 2006, however, he ignored his own 1999 decision and set precedent that conflicts with decisions of this Court and other circuits. The Circuit Court affirmed, without addressing the disparate impact theory raised by both Ms. Martin and NAWL in their Briefs. The argument is based on long-standing Title VII precedent, set by this Court, and should not have been ignored.

B. The D.C. Circuit's Decision Permits Employers to "Punish" Innocent Stalking Victims

Martin is a case that does not lend itself to the "blame the victim" prejudices that might be imposed upon women who are stalked by former husbands or domestic partners. Howard has never argued that Prof. Martin *chose* Harrison or that the stalking was somehow her "fault;" nevertheless, at oral argument (A-230-231), Howard's counsel played on the prejudices against domestic violence victims:

> The law, we would submit, doesn't make every time a woman is the subject of a stalking or a domestic violence issue a Title 7 federal anti-discrimination case.

Neither Ms. Martin nor *Amicus* NAWL suggested that employers enter women's homes and stop domestic violence; they sought only to hold employers liable for their *own* actions in the workplace. EEOC Regulation 29 CFR 1604.11(c) obligates the employer to take *reasonable* steps to

end sexual harassment in the workplace when it knew *or should have known* about it.[12] The denial of Title VII protection leaves women unprotected from workplace stalking and from being fired or castigated for reporting it.[13]

II. The D.C. Circuit Decision Violates the Law of the Case, Due Process and Rule 56(d)(1)

A. The 1999 Decision Complied with Rule 56(d)(1)

Fed. R. Civ. P. 56 (d)(1), states:

> CASE NOT FULLY ADJUDICATED ON THE MERITS.
> *Establishing Facts.* If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts – including items of damages or other relief – are not genuinely at issue. **The facts so specified must be treated as**

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[12] This precedent also applies to race and other types of discrimination. *See Maupin v. Howard Co. Bd. of Educ.*, No. 13C0506262 (Howard Cir. Ct, July 2, 2007) (African-American teacher received call at work purportedly from the Ku Klux Klan and the school denied her security.)

[13] Mr. Schwalb told the jury that Ms. Martin "*played the sexual harassment card.*" Tr. 2459:17 (**JA13,354**). He pointed to her accusingly and asked jurors, "Would you want Ms. Martin to teach *your children*?" (Tr. 2463:4-5, **JA13,358**) Law students are adults with college degrees.

established in the action. (Emphasis added)

In 1999, Judge Hogan properly identified facts established by the undisputed evidence and those to be decided by a jury. He concluded: *"it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female"* and that *Harrison "targeted women other than Plaintiff."* (A-27). Rule 56(d)(1) required that this factual determination remain *"established through the action"* -- not re-litigated by a jury.

In violation of Rule 56(d)(1), *after the trial*, Judge Hogan *abandoned* his own 1999 holding that Harrison's harassment was based on sex – also violating the law of the case[14] and the right to procedural due process. It is fundamentally unfair to try a case, operating under court decisions identifying the facts to be proved at trial, and then *add a triable fact after trial*, when the plaintiff has lost any opportunity to prove it.

B. **MJ Facciola's Reiteration of Judge Hogan's 1999 Decision is Clear and Accurate**

The Panel stated:

> The language in the Magistrate Judge's Report and Recommendation is admittedly inartful, but it did not (and could not)

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[14] Judges Edwards and Williams interrupted Ms. Martin's argument (A-219-220), exclaiming "No, no, no" (A-234) to her statement that "the law of the case" doctrine permits litigants to rely on the court's rulings and not continually re-litigate them. Judge Edwards indicated that her only possible argument could be a due process argument (A-235-238).

countermand the holding of the District Court.

(A-6)

The Panel did not indicate how MJ Facciola's decision was "inartful." He reiterated the issues that Judge Hogan had already identified as being resolved and those that would be tried by a jury:

> I. **Issues Resolved by Chief Judge Hogan Will Not Be Revisited**
>
> ...I must note that in 1999, Chief Judge Hogan denied HU's motion for summary judgment and specifically held that there were factual issues that precluded an award of summary judgment. *Martin v. Howard Univ.*, 1999 U.S. Dist. LEXIS 19516 (D.D.C. Dec. 16, 1999). As hard as it is to believe, in its current motion, HU ignores that decision and once again advances the very arguments that Judge Hogan rejected.... [W]hat HU cannot do is ignore the Chief Judge's decision and expect me to ignore it as well. I cannot reconsider a decision that I did not issue, nor do I have any power to overrule the Chief Judge. Thus, his determinations control.
>
> More specifically, **the Chief Judge concluded**:
>
> 1. *The alleged harassment by Harrison of the plaintiff was based on her sex;*
>
> 2. Whether Harrison's conduct was sufficiently severe or pervasive to be actionable under the rubric of a hostile environment claim was a jury question;

3. Whether plaintiff's letter was sufficiently detailed to place HU's Dean Alice Gresham Bullock ("Bullock") on notice that plaintiff believed that she had been the victim of a hostile work environment was a question of fact for the jury;

4. Whether plaintiff engaged in protected activity when she informed Bullock of Harrison's activities and complained about what she felt was the inadequacy of campus security was a question of fact for the jury;

....

I will not permit HU, in its second motion for summary judgment, to re-litigate those issues that were resolved against it. Triable issues of fact in 1999 remain triable issues of fact in 2003. (Emphases added)

(A-87-88).

It is difficult to imagine how MJ Facciola could have identified more clearly the issues that Judge Hogan decided in 1999 and those that would be tried by a jury.

C. Judge Hogan Expressly Adopted MJ Facciola's Interpretation of his 1999 Decision

On September 16, 2005, Judge Hogan *adopted* MJ Facciola's October 20, 2003 *Recommendation* as *his own decision.* (A-113). Ms. Martin therefore did *not* rely on a holding in which MJ Facciola "countermand[ed]" Judge Hogan but rather, on *Judge Hogan's own 2005 decision.*

D. The Undisputed Facts in Summary Judgment Motions Established the "Based on Sex" Finding

The Panel treated the 1999 decision as resolving only a Rule 12(b)(6) motion to dismiss (where allegations are presumed true) rather than as a Rule 56 *Motion for Summary Judgment*, stating:

> At that stage of the litigation, the District Court assumed the accuracy of the facts alleged by Ms. Martin and, based on her allegations, decided that it could not find as a matter of law that appellees were entitled to judgment.

(A-6)

Judge Hogan did not "assume" facts in 1999. Howard filed its first *Motion to Dismiss, or in the Alternative, for Summary Judgment* on July 22, 1999, with the required Local Rule 56.1 *Statement of Material Undisputed Facts* (JA297). Howard never disputed Prof. Martin's reports of Harrison's conduct.

E. The Panel's Interpretation of the 1999 Decision would Render it Internally Inconsistent and Grammatically Incorrect

The Appellate Panel stated:

> ... Chief Judge Hogan found only "that Mr. Harrison's conduct *could* be considered sexual harassment" and thus properly rejected appellee's motion to take the issue from the jury.

(A-6)

The Panel did not attempt to reconcile its interpretation with the excerpt *"it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female."* (A-27) The sentences should be construed consistently, rather than taking one word – "could" -- out of context. The Panel renders the decision internally inconsistent -- or at least confusing.

The Panel's reading of Judge Hogan's 1999 decision would also render it *grammatically incorrect* in two places. The excerpt more fully states:

> ... the Court finds that Mr. Harrison's conduct could be considered sexual harassment and that the question of whether this behavior was sufficiently severe or pervasive to be actionable ***is a*** jury question.... (emphasis added).

The *singular* verb "*is*" and the article "*a*" indicate that *only one issue* in the sentence is identified as a jury question – the question of "sufficiently severe and pervasive;" otherwise, it is grammatically incorrect.

III. "Legally Protected Activity" Must be Defined by a Court

It is a question of law – and the duty of the judge, rather than the jury-- to determine whether the

plaintiff has engaged in "*legally* protected activity."[15] Judge Hogan's 1999 determination that the harassment was based on gender necessarily meant that Prof. Martin's complaints constituted "protected activity." Not only did Judge Hogan erroneously submit this question to the jury, but he refused to instruct the jury on the law that he had set forth in his own 1999 decision that would have allowed them to apply the law to the facts. Since the jury was not provided with the law defining "protected activity," they did not realize that the plaintiff need not use the words "sexual harassment" in order to invoke Title VII protection. *See also* IV.

Without discussion, the Panel upheld Judge Hogan's refusal to provide it, along with his refusal to provide the jury with the D.C. stalking statute. (A-9-10)

IV. Title VII Protection should not be Denied Simply because Non-Employee Harassment -- as Described in EEOC Regulation 29 CFR 1604.11(e) -- is Reported Differently than Co-Worker Harassment

Judge Hogan set precedent for the District of Columbia, in 1999 by adopting EEOC Regulation 29 CFR § 1604.11(e) (A-24-25). He held that an employer is liable for the sexual harassment of an employee by a non-employee if it knew or should have known of the harassment, but failed to take reasonable steps to end it; however, both courts failed to analyze Prof. Martin's requests for campus

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[15] *McFarland v. George Washington University*, 2007 WL 3284016 at 11 (D.C. 2007); *Howard University v. Green*, 652 A.2d 41, 45-47 (D.C. 1994); *EEOC v. PVNF, LLC*, 487 F.3d 790, 803-804 (10th Circ. 2007).

security in the context of addressing sexual harassment by a non-employee.

The first step in taking "reasonable measures" to end workplace harassment by a *non-employee* is to ban the *non-employee* from the workplace. Prof. Martin entitled her memos "Security Problem on Campus"[16] to highlight the need for campus security to bar Harrison from campus.

The term "sexual harassment" may not receive immediate attention,[17] but conduct that had been characterized by the police as "stalking" conveys its severity and urgency. Courts have long recognized that *stalking is one of the most egregious forms of sexual harassment.*[18]

Howard's counsel told jurors that Ms. Martin was *not credible* when she testified that she complained of "harassment," because her memoranda referred to

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[16]Prof. Martin actually *did* refer to Harrison's conduct as "sexual harassment" before MPD characterized it as "stalking." Bruner deposition at 137:4-13 (JA6,808).

[17] Sexual harassment complaints received little, if any, response from Howard administrators. *See*, e.g., Sexual "jokes" circulated by Prof. Reggie Robinson, despite complaints by faculty members that it may constitute "sexual harassment." Pl's Ex. 23 (JA14,730).

[18] *Crowley v. L.L. Bean*, 303 F.3d 387, 396, 401-403 (D. Me. 2002); *Frazier v. Delco Electronics Corporation*, 263 F.3d 663, 668 (7th Cir. 2001); *Whitmore v. O'Connor Management, Inc.*, 156 F3d 796, 798 (8th Cir. 1998); *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1108 (8th Cir. 1998); *Angeles-Sanchez v. Alvarado*, 1993 U.S. App. LEXIS 10509 (1st Cir. 1993); *Spina v. Forest Preserve District of Cook County*, 207 F. Supp. 764, 772 (D. Ill. 2002); *Ramirez v. New York Presbyterian Hospital*, 129 F. Supp. 2d 676, 678 (S.D.N.Y. 2001); *Dolman v. Williamette University*, 2001 U.S. Dist. LEXIS 7772 (D. Or. 2001); *Chontos v. Rhea and Indiana University*, 29 F. Supp. 931, 937 ((N. Dist. Ind. 1998).

Harrison's conduct as "stalking;"[19] but the D.C. stalking statute, D.C. Criminal Code Ann. §22-404(b) defines "stalking" as:

> Any person who on more than one occasion ... willfully, maliciously, and repeatedly follows or **harasses** another person, is guilty of the crime of stalking. (Emphasis added)

"Stalking" is repeated "harassment." Deprived of the statute, jurors did not realize that Prof. Martin's "stalking" complaint was *necessarily* a *harassment* complaint, *by legal definition*.

In 1999, Judge Hogan relied on *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025 (D. Nev. 1992), holding that the plaintiff had engaged in "protected activity" when she told her employer simply, "I don't have to take this" because her employer observed customer behavior that he should have recognized as sexual harassment. (A-32) *Powell* held that a simple request to the employer to "do something" was enough to invoke Title VII. Judge Hogan continued: "There are no 'magic words' which must be chanted in order to invoke Title VII protection, *citing EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012-1013 (9th Cir. 1983). (A-33) Judge Hogan refused to instruct the jury using words from his own 1999 decision.

The Panel's holding that a trial judge may withhold from jurors the legal instruction that an employee is not required to use the words "sexual harassment" to invoke Title VII protection nullifies

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[19]Tr. 2477:21-2478:5 (JA13172-13373).

the 1999 decision. This nullification creates a split in the federal circuits.

V. Under *Oncale*, *Martin-Marietta*, *Meritor* and *Harris*, the Jury did not have Sufficient Evidence, as a Matter of Law, to Find that the Stalker's Harassment was not "Based on Sex"

A. Since Harrison Harassed Prof. Martin in Gender-Specific Terms, as a "Wife," he Sexually Harassed her

As Judge Hogan held in 1999, sexual harassment includes not only harassment that is "sexual in nature," but also harassment that is "based on sex" – or directed solely or disproportionately at members of one sex. (A-26, *citing Oncale v. Sundower Offshore Services*, 523 U.S. 75, 118 (1998)). Sex discrimination cases are established where offensive conduct affects *"primarily women"* even if it also affects some men.[20] The D.C. Circuit's decision conflicts with *Oncale* and sister circuits. Where a stalker *prowls campuses*, studying *female* professors in search of a *woman* to fulfill his vision of a fantasy "*wife*," his harassment is based on sex.[21] A "wife" is "a married *woman*." Cambridge University Press Dictionary, 2006.

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[20]*EEOC v. National Ed.*, 422 F.3d 840, 846 (9th Cir. 2005); *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d at 269; *Beard v. Southern Flying J, Inc.*, 266 F.3d 792 (8th Cir. 2001); *Lynch v. Freeman*, 817 F.2d 387; *Chrisner v. Complete Auto Transit*, 645 F2d. 1251, 1257 (6th Cir. 1981). *See also* I.

[21] *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917), requires that courts interpret words using "in their ordinary and usual sense." Although same-sex marriages may result in an evolving definition of "wife," this stalker used the word consistently with its 1997 dictionary meaning and pursued only women to be his "wife."

Where a harasser targets a woman because he fantasizes that she is related to him in any gender specific terms, such as "wife," "mother," "sister," "aunt," "grandmother," the target can only be a woman.[22] Harrison's gender specific language and conduct compel the finding that Harrison pursued Prof. Martin on the basis of her sex/gender.

In addition, marriage is inherently "sexual in nature," as a matter of law. Courts grant divorces where a spouse withholds sex. *Tedford v. Tedford*, 856 So. 2d 753 (Miss App. 2003); *Sullivan v. Sullivan*, 180 Misc.2d 433, 689 N.Y.S.2d 378, N.Y.Sup. (NY 1999); *George M. v. Mary Ann M.*, 171 A.D.2d 651, 567 N.Y.S.2d 132 (NY 1991). Harrison's pursuit of Prof. Martin to make her his "wife" constitutes sexual harassment not only because it was based on sex, but also because it was "sexual in nature," as a matter of law.

B. The D.C. Circuit Ignored this Court's "Sex-Plus" Analysis in *Phillips v. Martin Marietta Corp*

Harrison harassed *women* lawyers and professors on the basis of "sex *plus" profession*. The Panel failed to address Ms. Martin's and NAWL's arguments that a "sex-plus" case constitutes discrimination on the basis of sex. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Back v. Hastings on the Hudson*, 365 F.3d 107, 108 (2d Cir.

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[22] Where harassment includes gender-specific language, it is based on sex. *Mertes v. Wynne*, 2007 WL 3203004 at *12 (E.D. Cal. 2007).

2004); *Judge v. Marsh*, 649 F. Supp. 770, 779-780 (D.D.C. 1980).[23]

C. Pursuant to *Meritor* and its Progeny, a Sexual Harassment Claim should not be Defeated because the Harasser did not "Grope" or "Touch" the Victim

The Panel left intact Judge Hogan's October 4, 2006 decision holding that Harrison's stalking of Prof. Martin was not "sexual in nature" or based on her sex because the harassment did not involve "groping" or "touching" which he found to be "conduct typical of sexual harassment cases." (A-146)

The D.C. Circuit's affirmance allows juries to dismiss sexual harassment cases where there has been no physical assault. This precedent arguably requires women to be sexually *assaulted* before they can sustain sexual harassment claims, in directly violation of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) and their progeny. *Accord*, *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 965 (8th Cir.1993) (a woman need not be "propositioned, touched offensively, or harassed by sexual innuendo" in order to prevail in a sexual harassment claim); *EEOC Policy Guidance on Current Issues of Sexual Harassment*, N-915-050,
particularly Section C, 3, *Non-physical Harassment,* http://www.eeoc.gov/policy/docs/currentissues.html.

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[23] Judge Hogan decided *Marsh*, which was a "sex plus race" case.

D. Ms. Martin was Prevented from Presenting Evidence on the Determinative "Based on Sex" Question, Depriving her of Due Process

The Appellate Panel held: "it is absolutely clear from the record in this case that both sides addressed the 'based on gender' question at trial and that neither side was foreclosed from presenting its case on this issue." (A-7) The Panel did not cite *anything* the record to support its conclusion; moreover, Ms. Martin specified, in her Briefs and at oral argument, how *she was foreclosed* from presenting evidence on this issue. (A-221-223, 236-238) Most notably, when Ms. Martin's counsel attempted to cross-examine Dean Bullock on her understanding of the sexual nature of Harrison's conduct, Judge Hogan *stopped the examination*, proclaiming that *the question had "no evidentiary value,"* specifying that *"[i]t doesn't go to prove or disprove the fact at issue."*[24]

Judge Hogan's pronouncement again reaffirmed his 1999 decision holding that the question of whether Harrison's harassment was based on sex was not "a fact at issue." In addition, because he cut off her questions when she approached this subject, Ms. Martin did not even have the *opportunity* to elicit testimony at trial to prove the issue that morphed into the determinative jury question. She was thereby deprived of due process.

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[24] (A-184-185) Tr. 1534:9-1535:4 (**JA**12,328-12,329).

E. The Panel Relied on Howard's Misrepresentations, Undisputed Perjury and Misconduct

On a motion for judgment as a matter of law, "[t]he court should draw reasonable inferences on behalf of the non-moving party, but *it must not slip into sheer speculation*" (emphasis added).[25] Even *if* Judge Hogan had not decided the "based on gender" question in 1999, and even *if* Ms. Martin had addressed this question at trial, any "evidence" that the Court *speculated* might have justified the jury's conclusion was woefully insufficient to support the verdict. The Court stated:

> [t]here was ample evidence – including the fact that Harrison had stalked at least one man in the past – from which the jury could have concluded that Harrison's conduct was not based on Ms. Martin's gender. Indeed, the jury reasonably may have concluded that Harrison's stalking was attributable to his *misidentificatio*n of Ms. Martin as his wife, not bad behavior based on Ms. Martin's gender.

(A-7-8) The Court's conclusions are fatally flawed, as discussed below.

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[25] *Gibson v. Old Town Trolly Tours of Washington, D.C. Inc.*, 160 F.3d 177 (4th Cir. 1998), citing *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982); Fed. R. Civ. P. 50(a)(1).

1. Dean Bullock Admitted that she Perceived Harrison as a Stalker/Harasser of *Women Only*

The jury overlooked the *conclusive* evidence that Dean Bullock perceived Harrison as harassing *women only*. In her July 1, 1999 memo to Howard's General Counsel, Dean Bullock admitted that she and Dean Newsom were concerned that Harrison might "*stalk or otherwise harass*" Prof. Martin or "other *women*" on campus. (A-196). Dean Bullock's self-serving testimony at trial cannot serve as sufficient evidence to rebut her own contradictory July 1, 1998 written admission that Harrison was targeting *women* as stalking victims.

Howard repeated Dean Bullock's conclusive admission in its Response to the EEOC, through a sworn affidavit of its Assistant General Counsel (A-207) and again, in its Answers to Interrogatories in 2001. Since this factual finding had been determined both in Judge Hogan's 1999 decision and by Dean Bullock's own admission, repeated by its counsel – and the court -- for six years, it was a complete surprise to Ms. Martin when it was submitted to the jury in 2006 and a verdict returned in favor of Howard.

2. Harrison had no "Wife," but Used "Gender Profiling" to Harass Women who fit the Profile of his Ideal "Wife"

Harrison could not possibly have "misidentified" Prof. Martin for a fictitious, *non-existent woman*. For the first time, three years into this litigation, Howard asserted a *completely baseless* fabrication of an "estranged wife" to argue that Harrison's harassment was not "severe and pervasive."

Howard's September 30, 2002 *Motion for Summary Judgment*, at 2 (**JA5,415**) Howard lost this issue at trial. Jury Verdict #1(a) (A-127). On appeal, Howard changed the purported purpose of this fabrication and argued that it proved that Harrison did not target Prof. Martin based on her gender.

Ms. Martin repeatedly exposed Howard's sanctionable misrepresentations of the record. She even filed three motions for sanctions.[26] Not only was there never an iota of *evidence* to support Howard's *fable*, but *even the delusional Harrison understood that he had never been married to the fictional character, "Geneva Crenshaw."* (A-184-185)

Harrison "explained" that he pursued women of vastly different physical descriptions and different names searching for the woman who might meet his fantasy of a "perfect wife." (A-184-190) For example, Harrison described another woman whom he identified as his "natural wife" in *1988*, as 6'4" tall, with long straight black hair and a long, straight nose.[27] (A-187) Ms. Martin is 5'5," with brown curly hair and a small, round nose. Clearly, no one could "misidentify" these two women for the same "wife."

The Court's errors of law are based, in part, on its false statements of fact. Rather than punish

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[26] The District Court ignored, and never decided, her November 13, 2002 *Motion to Strike Defendant's Motion for Summary Judgment and to Preclude Defendants Eleventh Hour Defense, Alleging Bad Judgment.* The Appellate Panel denied each of her motions with one sentence. (A-14, 15) On April 11, 2008, the Panel ordered the Clerk not to accept any further motions for sanctions from *Appellant*. (A-16)

[27] This description fits Prof. Lani Guinier, then at the University of Pennsylvania Law School, whom Harrison also targeted. (A-215)

Howard for its flagrant frauds upon the court, the Panel published Howard's fabrications as truth. Due process, the interests of justice and the integrity of the judicial system require reversal.

3. "Gender Profiling" is the Same whether the "Model" Woman is Real or Imagined

As a matter of law, even if Harrison had harassed Prof. Martin because he believed that she resembled an *actual* person, or an *estranged wife*, the harassment would be *based on sex*. At oral argument, Howard *conceded* that anytime a person is targeted based on resemblance to a *real* person, *gender is necessarily part of the criteria used to target the person*. (A-231) Judge Henderson asked, "*Why isn't that enough?... I mean, if she had been a man, he wouldn't have misidentified her as he did.*" (A-230). Indeed, it is enough to satisfy *Oncale*.

The potential number of women that Harrison has harassed – and may still be harassing in his quest for the unobtainable – is endless. He might as well have been looking for "*Wonder Woman.*" This "gender profiling" constitutes harassment based on sex.

4. There is *No Evidence* that Harrison ever "Stalked" a Man

There was *never any evidence* that Harrison "*stalked*" any *man*. Howard improperly referred to Harrison's *one-time contact* with Prof. Derrick Bell, in 1990, as "stalking." Prof. Bell's affidavit (A-213-216), as well Harrison's letter to another woman

whom he pursued (A-187, 185)[28] (*both hearsay*)[29] explain that Harrison confronted Prof. Bell – for the sole purpose of asking him to identify the "real Geneva Crenshaw" -- his next *female* stalking victim. This one time contact, at *Harvard* Law School, seven years earlier, does not meet the definition of "stalking," which is *repeated* harassment.[30] The court's impermissible *speculation* that that the jury concluded that Harrison "stalked" Derrick Bell is completely unfounded.

5. A Woman's Sexual Harassment Claim should not be Defeated Simply because the Harasser Once Threatened a Man

Under the D.C. Circuit's analysis, a woman's sexual harassment claim can be defeated by a simple showing that the harasser, at some point in his life, demonstrated threatening behavior toward a man, for any reason. The court could similarly conclude that John Hinckley did not stalk Jodie Foster based on her sex because he also shot Ronald Reagan. Aggressive behavior in other contexts does not negate the fact that a man pursued a particular woman based on romantic or sexual desire and that

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[28] A law firm in Toronto contacted Prof. Martin because Harrison mentioned her as one of the women whom he had pursued. Harrison compared and described these women in sexual terms, such as "prettier," "more voluptuous," and being "infatuated with her legs." (A-186-187) In 1999, Judge Hogan relied on these statements, in part, to conclude that Harrison's harassment was based on sex. (A-26-27)

[29] Judge Hogan refused to allow Prof. Bell, Prof. Guinier or other professors who had contact with Harrison to testify. (A-118)

[30] *See* III.

he would not have so targeted her if she had been a man.[31]

VI. The District Court Decision -- Left Intact by the Circuit Court -- Sets Precedent in Retaliation Claims that Violates *Burlington Northern* and Creates Conflict within the Circuits

A. Where an Employer Cancels Vacancies to Exclude an Employee who Engaged in "Protected Activity," it Constitutes Actionable Retaliation

Ms. Martin alleged that, in retaliation for reporting Harrison's stalking, Dean Bullock orchestrated her non-renewal by canceling and concealing vacant faculty positions. In 1999, Judge Hogan sustained these retaliation claims (A-30-32); however, on October 20, 2003, MJ Facciola dismissed them (A-104-111), holding: *"Title VII applies only to ultimate employment decisions such as hiring or discharging...."*[32] (A-108). Judge Hogan adopted this decision as his own (A-113) over Ms. Martin's detailed *Objection* -- even though Howard agreed that it was replete with errors.

MJ Facciola's dismissal of these claims flies in the face of *Burlington Northern v. White,* 548 U.S. 53, 64 (2006). *Burlington* expressly held that *actionable retaliation under Title VII is not limited to "hiring, firing and promotion."* This precedent also conflicts

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[31] *See also* Section I,A.

[32] In the same decision, MJ Facciola actually characterized Prof. Martin's non-renewal as a "firing" (A-103), a "dismissal" and "loss of her job" (A-107) and a tenure turn-down (A-95-100). He also stated: "[p]laintiff lost her job and it was given to Cunningham." (A-95)

with other circuits that protect employees from retaliation through of vacancy cancellations. *See Terry v. Gallegos*, 926 F. Supp. 679, 709-10 (W.D.Tenn.1996); *Ruggieri v. Merit Systems Protection Board*, 454 F.3d 1323, 1326-1327 (Fed. Cir. 2006) ("whistleblower"). *See also* fn. 8.

B. The Trial Court Violated Rule 8(c) by Dismissing Retaliation Claims, *Sua Sponte*

When MJ Facciola dismissed Ms. Martin's retaliation claims, he effectively reversed Judge Hogan's 1999 decision[33] -- and he did so *sua sponte*.[34] Fed. R. Civ. P. 8(c) requires the defendant to *assert its own defenses* or *waive them*. A judge commits reversible error by dismissing a case based on a *sua sponte* waivable defense. *Erline Co. S.A. v. Johnson,* 2006 U.S. App. LEXIS 6621 at *24 (4th Cir. 1996); *Haskell v. Wash. Twp.*, 864 F.2d 1266, 1273 (6th Cir. 1988); *Wagner v. Fawcett Publ'ns*, 307 F.2d 409, 412 (7th Cir. 1962).

VII. Age Discrimination is not a "Legitimate, Non-Discriminatory" Defense to a Retaliation Claim

Even as of its closing argument, Howard could not make up its mind as to its defense. At trial, then APT Committee Chair, Prof. Leggett – now the

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[33] With these claims restored, Howard's argument that the junior selectee was more qualified than Prof. Martin to fill the EEO/Labor position is almost irrelevant. Dean Bullock excluded Prof. Martin from consideration where her "competition" consisted of *three empty chairs*.

[34] MJ Facciola stated that Howard raised this argument (A-88-89), but it was *not* in Howard's motion.

County Executive for Montgomery County, Maryland – shockingly resorted to a football analogy, comparing Martin to an *aging* "veteran" *football player*. Howard's counsel told the jurors that the "team" decided to go with the "rookie quarterback" even though she had "less experience" than Prof. Martin, because "that rookie" might be the team's "franchise player one day."[35]

Howard's desperate finale constitutes an admission of a *per se* violation of the *Age Discrimination in Employment Act* (ADEA), 29 U.S.C. Section 621-634, *et seq*. Ms. Martin raised her ADEA claim in her post trial motions for judgment, although she did not formally move to amend the Complaint. Even had she not raised it at all, however, an appellate court may consider an issue – even belatedly raised on appeal -- "where injustice might otherwise result." *IRS v. Murphy*, 493 F.3d 170, 172 (D.C. Cir. 2007).

VIII. Taxing Defendants' Costs to Appellant Will Have a Chilling Effect on Civil Rights Plaintiffs

The district court taxed Howard's litigation costs to Ms. Martin. (A-137)[36] Judge Hogan flatly *refused to consider any arguments* in her *Opposition to Costs*. (A-159) A court must exercise restraint in assessing

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[35] Tr. 2501:13-24 (**JA**13,396). Howard never explained how playing *football* is like teaching law school. Prof. Martin was 40. Only two years earlier, the APT Committee described Prof. Martin as a "*young*" scholar.

[36] The Panel held that her appeal was not ripe for review because costs (over $11,000) would not be imposed until the mandate was issued (A-12); but the mandate had not yet issued only because Ms. Martin appealed. It has now been issued. (A-17)

whether costs should be assessed against a non-prevailing party in "public law litigation" cases such as Title VII of the Civil Rights Act of 1964.[37] Ms. Martin and NAWL urged the D.C. Circuit to adopt the *criteria* to prevent the financial hardship and a chilling effect on Title VII plaintiffs. See, e.g., *County of Suffolk v. Secretary,* 76 F.R.D. 469 (E.D.N.Y. 1977).

IX. Facts Establishing Sexual Harassment and Retaliation may also Constitute an Independent Claim of Intentional Infliction of Emotional Distress

In 1999, Judge Hogan dismissed Ms. Martin's intentional infliction of emotional distress claim, stating that her allegations did not constitute "outrageous" conduct. (A-8) *Kassem v. Washington Hospital Center,* 513 F.3d 251, 255 (D.C. Cir. 2008) held that a plaintiff who was sexually harassed by her supervisor and/or retaliated against for opposing it, could sustain a claim of intentional infliction of emotional distress (IIED) in addition to Title VII. Such conduct violates public policy and constitutes "outrageous" conduct. *Id. Accord, Nixon v. Majors,* 2007 WL 4592277 at *5 .

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[37] *Crawford Fitting Co. v. Gibbons,* 482 U.S. 437 (1987); *Baez v. the United States,* 684 F.2d 999, 1003-1004, 1007 (D.C. Cir. 1982); *Pannonia Farms v. RE/Max International, Inc,* 2005 WL 3262902 at * 3 (D.D.C. 2005); *Summit v. Technology, Inc.* 435 F.3d 1371, 1374 (Fed. Cir. 2006); *Dual v. Cleland,* 79 F.R.D. 696, 697 (D.D.C. 1978).

X. Terminating a Woman for being Stalked Constitutes Wrongful Termination, in Violation of Public Policy

Wrongful discharge claims are permitted where there is no statutory basis for a claim, but the discharge violates public policy. *Elemary v. Holzmann*, 2008 WL 316376 (D.D.C. 2008) at 14, *citing Kassem*, 513 F.3d at 254-255. If there is no Title VII protection, there is no statutory basis for her claim; however, *then* the facts constitute a claim of wrongful discharge.

XI. A Court May not Place Mandatory Rule 37 Sanctions -- in Excess of $364,000 -- in "Perpetual Abeyance"

More than **$364,000.00** worth of attorney time was necessary to obtain discovery improperly withheld by Howard. After three years of withholding and delaying discovery, Howard was held in Contempt of Court for violating repeated court orders to produce documents and witnesses. (A-78; 204 F. Supp. 1 (D.D.C. 2002) (A-71)) Ms. Martin moved for mandatory sanctions, under Rule 37(A).

Howard never challenged her entitlement to the money, but MJ Facciola, *sua sponte*, placed the issue in abeyance. (A-61, 66, 70) Despite numerous motions to decide it, neither Judge Hogan nor MJ Facciola would address it; neither has the Appellate Panel.

Justice delayed is certainly justice denied -- and casting a motion into perpetual limbo certainly violates due process. By closing the case without deciding this motion, the district court avoided punishing Howard's egregious misconduct and

deprived Ms. Martin of her *mandatory* remedy for the hundreds of hours of legal work drained from her firm. Howard caused Ms. Martin severe financial hardship – and the court compounded it by assessing Howard's litigation costs against *her*. *See* VIII.

XII. The Court Unduly Prejudices a *Pro Se* Party by Ordering her to Ask herself Questions *on the Witness Stand* and to Talk about herself in the Third-Person

The trial court abused its discretion and erred, as a matter of law, in numerous evidentiary rulings. Howard was permitted to raise false, irrelevant and prejudicial allegations to confuse, distract and "trick" jury into believing that Ms. Martin was lying – about anything. The Court thus violated Federal Rule of Civil Procedure 11 and Federal Rules of Evidence 403 and 404.

One error, in particular, sets unduly prejudicial precedent in *both civil and criminal trials* involving *pro se* litigants. During trial, Ms. Martin's first attorney quit, at the urging of "lawyers all over town" (Tr. 1109:77-1138:5, **JA**11,903-11,932).[38] The "emergency" lawyer who replaced him was incapacitated by a medical disability and mind-altering medications. (Tr. 2164:12-24, **JA**13,059); 2183:7-2186:8 (**JA**13,078-13,082; 2195:4-2209:13, **JA**13,090-13,104) The day before closing argument, Ms. Martin had conclude her case *pro se*. She briefly cross-examined Prof. Gavil, rebutted his testimony with her own and gave her own closing statement.

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[38] These 1999 Howard graduates were overwhelmed by Judge Hogan's adverse rulings, their own conflicts litigating against Howard and Howard's team of lawyers (four participating, with reinforcements in the audience).

Judge Hogan ordered Ms. Martin to *ask herself questions on the witness stand* and to talk *about herself in the third person*. This *spectacle* conjures up concepts of mental instability and can be "jarring."[39] Ms. Martin's examination *of herself* appeared *comical* and ridiculous. It distracted jurors from the seriousness and truthfulness of her testimony.

Ms. Martin's credibility was material to several issues, including whether she perceived Harrison's stalking as sexual harassment. Her breach of contract claim depended *entirely* on assessments of her credibility versus Andrew Taslitz. (A-35-36) Prof. Taslitz recruited Prof. Martin and conducted the hiring negotiations. (*Id.*; A-200, 210) As Judge Hogan determined in 1999, oral representations were part of the contract. (A-35-36) The court's damage to Ms. Martin's credibility may well have caused the jury to weigh credibility determinations against her. *Pro se* litigants should not be so prejudiced, in civil or criminal proceedings.

Further compounding the undue prejudice, upon Howard's motion and over Ms. Martin's vehement objection, Judge Hogan told jurors that she discharged two attorneys and repeated it in his 2006 decision. (A-140)

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[39]*Soto v. Runnels*, 2006 WL 183706 *7 fn.5 (E.D.Cal. 2006); *People v. Hill*, 732 Ill.App.3d 691 (Ill.App. 1999); *Howard v. State*, 697 So.2d 415 (Miss. 1997); *State v. Johnson*, 551 N.W.2d 742 (Neb. App. 1996).

XIII. An *Unopposed* Motion to Vacate a Published Decision that the Parties Agree is Replete with Errors that Damage a Party's Reputation, should be Granted

Both parties agreed that the October 20, 2003 *Recommendation* is replete with errors. Some of these statements (A-92-100, A-107, A-111-112) would constitute defamation were they not cloaked in judicial immunity.

The decision also relies on the allegations by Prof. Gavil that MJ Facciola *ordered precluded.* (A-98-89) Howard defended its flagrant violation of the Order, by claiming that, in an *ex parte* court appearance, *Judge Hogan*:

> appeared to indicate to defense counsel that it was possible that the Court did not mean to preclude them from asserting this factual matter as a defense.

Defendant's Opposition to Plaintiff's Motion to Strike, at 7 (**JA**8116).

MJ Facciola ignored Ms. Martin's *Motion to Strike Defendant's Motion for Summary Judgment and to Preclude Defendants Eleventh-Hour Defense, Alleging "Bad Judgment."* Howard did not oppose Ms. Martin's motions to vacate the published *Recommendation*; yet Judge Hogan adopted it, leaving it in the public domain to disparage Ms. Martin's character for posterity.

CONCLUSION

Petitioner respectfully requests that *certiorari* be granted.

Respectfully submitted,

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APPENDIX

2008 WL 1885434 (C.A.D.C.)

Dawn V. MARTIN, Appellant
v.
HOWARD UNIVERSITY, et al., Appellees.
No. 06-7157.
March 31, 2008.
Rehearing En Banc Denied May 20, 2008.
Appeal from the United States District Court for the District of Columbia (99cv01175).
Dawn V. Martin, Law Office of Dawn V. Martin, Washington, DC, pro se.

Leroy T. Jenkins, Jr., Brian L. Schwalb, Maurice Baskin, Venable LLP, Washington, DC; Frederick Douglas Cooke, Jr., Rubin, Winston, Diercks, Harris & Cooke, LLP, Washington, DC, for Appellees.
Roberta Y. Wright, Law Office of Roberta Yvonne Wright, Washington, DC, for Amicus Curiae National Association of Women Lawyers.

Before HENDERSON, Circuit Judge, and EDWARDS and WILLIAMS, Senior Circuit Judges.
JUDGMENT
PER CURIAM.
*1 This cause was considered on the record from the United States District Court for the District of Columbia, and was briefed and argued by counsel. It is Ordered and Adjudged that the judgment of the District Court be affirmed for the reasons set forth in the accompanying memorandum.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See Fed. R.App. P. 41(b); D .C. Cir. R. 41.

MEMORANDUM

Appellant Dawn Martin challenges several decisions of the trial judge and a jury verdict regarding her discrimination, contract, and tort claims against Howard University and Howard University School of Law (collectively "Howard"), and Alice Gresham-Bullock, former Dean of the law school. The factual background of this case is adequately sketched in a Memorandum Opinion of Chief Judge Hogan. See Martin v. Howard University, No. 99-1175, 2006 WL 2850656 (D.D.C. Oct.4, 2006).

Plaintiff Dawn Martin, a Visiting Professor at Howard University School of Law from July 1996 through May 1998, brought this action against several defendants on May 14, 1999....

Plaintiff alleges that she was the victim of a hostile work environment in violation of Title VII and the District of Columbia Human Rights Act as a result of the conduct of Mr. Leonard Harrison, a homeless person who was neither an employee of, nor a student at, Howard. Specifically, Mr. Harrison sent Plaintiff two letters that were hand-delivered to Plaintiff's office, left voice mail messages for her, and attempted three personal visits to Plaintiff's office

(Plaintiff was only in her office during the third visit and Harrison was chased out by a security officer), and at one point stated that he thought Plaintiff was his wife. Plaintiff has claimed that Howard's response and inaction towards Mr. Harrison is a violation of Title VII. Plaintiff's other two claims include retaliation in violation of Title VII and breach of contract. Plaintiff asserted that because of her complaints regarding Mr. Harrison and her requests for protection from Mr. Harrison, the administration retaliated against her in several ways.... [First,] the then Dean of the law school, Dean Bullock, got the Appointments, Promotions and Tenure Committee ("APT Committee") to not recommend Plaintiff for the EEO/Labor Law tenure-track position she sought and to instead recommend Professor Cunningham, and [second,] that Dean Newsom sent Plaintiff a letter asking her to vacate her office early, in May 1998, rather than in June or July 1998 when most professors had to leave. Plaintiff also alleges she had an oral contract that her ... visitorship would be renewed until a tenure-track position became available, at which time she would get that position. Plaintiff alleged the contract was breached when she was not selected for any tenure-track position.

*2 Id. at *1 (citations omitted).

As noted in Chief Judge Hogan's opinion, Ms. Martin's first claim of discrimination is that the law school's response to Harrison was inadequate, causing her to endure a hostile work environment. Her second discrimination claim is that because she complained of sexual harassment by Harrison, the

law school retaliated against her by, inter alia, failing to offer her continued employment. Ms. Martin also argues that Howard and Dean Bullock caused her to suffer emotional distress by failing to provide her with a tenure-track position and adequately protect her from Harrison. Finally, Ms. Martin argues that the law school violated a binding promise to continue her employment, either as a visiting professor or a tenure-track professor.

Before the jury trial, the District Court granted summary judgment for all defendants on Ms. Martin's tort claim, and limited Ms. Martin's retaliation claims to the law school's decision not to hire Ms. Martin and its order for her to vacate her office. Following the trial, the jury found: (1) that Ms. Martin had failed to prove that Harrison's conduct was based on her gender; (2) that Ms. Martin had not proven that she was engaged in legally protected conduct when she informed the law school about Harrison's behavior; and (3) that Ms. Martin had failed to prove that she had ever been promised future employment by the law school. These findings disposed of Ms. Martin's claims. The District Court denied Ms. Martin's motions for judgment as a matter of law, for relief from the final judgment, and for a new trial. We now review those decisions.

I.

Before trial, Howard contended that Ms. Martin's hostile work environment claim should be dismissed, because she could not show that Harrison's conduct was based on gender and that Harrison's conduct

was sufficiently severe or pervasive. In a memorandum opinion addressing Defendants' Motion to Dismiss or Alternatively for Summary Judgment with regard to Ms. Martin's hostile work environment claim, the District Court first stated that, "[i]n this case, it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female; therefore, the alleged stalking activities do appear to have been 'because of sex' even if they were not inherently sexual in nature." Martin v. Howard Univ., No. 99-1175, 1999 WL 1295339 (D.D.C. Dec.16, 1999). The trial judge then went on to say:

[S]ince the Court finds that Mr. Harrison's conduct could be considered sexual harassment and that the question of whether this behavior was sufficiently severe or pervasive to be actionable is a jury question, and since Defendants admit that there is a material dispute regarding whether the University took appropriate actions in connection with Mr. Harrison, the Court must deny Defendants' Motion to Dismiss or Alternatively for Summary Judgment with regard to the Hostile Work Environment claim.

Id. (emphasis added). The District Court never held that Harrison's alleged stalking activities constituted conduct based on gender. The question of whether Harrison's conduct could be considered sexual harassment was then submitted to the jury, along with Ms. Martin's other claims.

*3 [1] Ms. Martin now argues that the question of whether Harrison's behavior was based on Ms. Martin's gender should not have been submitted to

the jury, because it was decided in her favor in Chief Judge Hogan's 1999 opinion addressing Defendants' Motion to Dismiss or Alternatively for Summary Judgment. To bolster this argument, Ms. Martin points to a 2003 Magistrate Judge's Report and Recommendation stating that the trial judge had already "concluded [that] [t]he alleged harassment by Harrison of the plaintiff was based on her sex." Martin v. Howard Univ., No. 99-1175, 2003 WL 22383031, at *2 (D.D.C. Oct.20, 2003) (Report and Recommendation). Ms. Martin contends that submitting this question to the jury violated the law of the case.

Martin obviously misinterprets the meaning of the District Court's denial of appellees' Motion to Dismiss or Alternatively for Summary Judgment. At that stage of the litigation, the District Court assumed the accuracy of the facts alleged by Ms. Martin and, based on her allegations, decided that it could not find as a matter of law that appellees were entitled to judgment. In other words, Chief Judge Hogan found only "that Mr. Harrison's conduct could be considered sexual harassment" and, thus, properly rejected appellees' motion to take the issue from the jury. The language in the Magistrate Judge's Report and Recommendation is admittedly inartful, but it did not (and could not) countermand the holding of the District Court. In short, in submitting the question of whether Harrison's behavior was based on Ms. Martin's gender, the District Court did not violate the law of the case, nor did it act in a fashion that was contrary to its 1999 decision on this matter.

II.

[2] Ms. Martin also argues that she was prevented from fully presenting her case to the jury on the "based on gender" question. However, she does not indicate any action that she took-or failed to take-based on a misunderstanding as to what claims were before the jury. Indeed, it is absolutely clear from the record in this case that both sides addressed the "based on gender" question at trial and neither side was foreclosed from presenting its case on this issue. Because Ms. Martin fails to show that her case was somehow impermissibly compromised, we reject this challenge to the jury's verdict.

III.

[3] Ms. Martin additionally contends that the District Court erred in denying her motion for a judgment as a matter of law on the "based on gender" question. We disagree. The grant of judgment as a matter of law is rarely appropriate. "Intrusion upon the rightful province of the jury is highly disfavored. We have repeatedly emphasized that the jury's verdict must stand unless the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable people could not disagree on the verdict." Smith v. District of Columbia, 413 F.3d 86, 97 (D.C.Cir.2005) (alterations and quotation marks omitted). Ms. Martin does not meet this exceedingly high standard. There was ample evidence-including the fact that Harrison had stalked at least one man in the past-from which the jury could have concluded that Harrison's conduct was not based on Ms.

Martin's gender. Indeed, the jury reasonably may have concluded that Harrison's stalking was attributable to his misidentification of Ms. Martin as his wife, not bad behavior based on Ms. Martin's gender. We need not decide whether and under what circumstances stalking might amount to harassment "based on gender." Rather, we merely hold that on the facts of this case, the jury's verdict must stand.

IV.

*4 [4] [5] Ms. Martin further contends that the District Court should have entered judgment as a matter of law on her retaliation and contract claims. We reject these claims as well. Under the applicable standard governing judgments as a matter of law, the District Court acted correctly on both issues. The jury had evidence before it, including Ms. Martin's own earlier characterization of Harrison's conduct as a security matter, not sexual harassment, from which it could conclude that Ms. Martin's complaints about Harrison were not protected activity. And the jury's verdict that Ms. Martin was not promised future employment by Howard was amply supported by the evidence.

V.

[6] Ms. Martin next challenges the grants of summary judgment for appellees on her tort and retaliation claims. The District Court's finding that Ms. Martin had failed to allege the outrageous conduct needed to make out a claim of intentional infliction of emotion distress is well-founded. Under District of Columbia law, this tort "requires conduct so outrageous in character, and so extreme in

degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Browning v. Clinton, 292 F.3d 235, 248 (D.C.Cir.2002) (quotation marks omitted). Ms. Martin alleged no such outrageous conduct.

[7] The District Court limited Ms. Martin's retaliation claims to two alleged harms-the decision of Howard Law not to hire her for a tenure-track position in equal employment opportunity law and her expulsion from her office. Any challenge to these alleged harms is now moot. Because the jury reasonably found that Ms. Martin had not engaged in protected activity, the necessary predicate for her claims of retaliation is missing.

VI.

Ms. Martin raises various challenges to evidentiary and procedural decisions made by the District Court during trial, and contests some jury instructions. The trial court's evidentiary and procedural decisions at issue are reviewed for abuse of discretion. See, e.g., United States v. Graham, 317 F.3d 262, 266 (D.C.Cir.2003) (hearsay); United States v. Hemphill, 514 F.3d 1350, 1360 (D.C.Cir.2008) (cross examination). After careful review of the record, we can find no abuse of discretion in any of these decisions.

[8] Ms. Martin has also failed to show that any alleged error with respect to a jury instruction was other than harmless. Fed.R.Civ.P. 61. Indeed, we find that the jury instructions challenged by Ms.

Martin were proper. The District Court's instruction on the standard for protected activity in retaliation claims was correct. And the District Court properly excluded as irrelevant the District of Columbia criminal code's definition of stalking, which Ms. Martin sought to have included in the jury instructions on hostile work environment.

VII.

[9] Ms. Martin has moved under Federal Rule of Civil Procedure 60(b)(3) for relief from the judgment based on the allegedly perjured testimony of former-Dean Bullock. It is "well-settled that a litigant seeking relief from a judgment under [Rule] 60(b)(3) based on allegations of fraud upon the court must prove the fraud by clear and convincing evidence." Shepherd v. Am. Broad. Cos., 62 F.3d 1469, 1477 (D.C.Cir.1995). Ms. Martin has not come close to meeting this standard. Nor has she shown prejudice. Summers v. Howard Univ., 374 F.3d 1188, 1193 (D.C.Cir.2004).

VIII.

*5 [10] In her brief to this court, Ms. Martin asserts that Howard's failure to hire her for an equal employment opportunity law position was a violation of the Age Discrimination in Employment Act ("ADEA"), because it was allegedly revealed at trial that the person appointed to this position was selected because of her age. Ms. Martin's complaint did not include an ADEA claim, so this matter was not tried before the jury and it is not properly before this court. Singleton v. Wulff, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) ("It is the general

rule, of course, that a federal appellate court does not consider an issue not passed upon below."). In her reply brief, Ms. Martin belatedly argues that she "had no reason or opportunity, prior to trial, to amend the complaint to include an ADEA claim [, because i]t was only at trial that [Howard Law] Prof. Leggett ... made the eleventh-hour admission-that he selected Visiting Assistant Professor Cunningham over Visiting Associate Professor Martin to teach the EEO class because of her age that this issue arose." Appellant's Reply Br. at 19 (emphasis omitted). However, Ms. Martin did not object at trial or seek to amend her complaint upon hearing Professor Leggett's testimony. Ms. Martin asserts that she asked in her post-trial motion to be "permitted to amend her complaint to include a claim of age discrimination under the ADEA," citing her Reply to Defendant's Opposition to Plaintiff's Motion for Judgment on Her Retaliation Claims, Or in the Alternative, for a New Trial at 22-23, reprinted in Joint Appendix ("JA") 10,264-65. Id. But there is no motion to amend the complaint at the cited pages. Rather, Ms. Martin merely stated that she was "considering filing a motion to amend her complaint to conform to the evidence produced at trial, to add a claim under the ADEA." JA 10,264 n. 20 (emphasis added). And in responding to Ms. Martin's post-trial motion, the District Court plainly saw no motion to amend the complaint. We therefore reject Ms. Martin's belated attempt to add an ADEA claim to this case.

IX.

[11] Finally, Ms. Martin's challenge to the imposition of costs by the District Court is not ripe for review. As explained by the trial court, costs are imposed after this court issues its mandate. Martin v. Howard Univ., Civ. Action No. 99-1175, slip op. at 1 (D.D.C. Jan. 23, 2007) (order). Because the District Court has not yet exercised its discretion on this question, there is no ruling to review.

The judgment of the District Court is hereby affirmed.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7157 **September Term 2007**

Dawn V. Martin,
Appellant

Filed On:
May 20, 2008

v.

Howard University, et al.,
Defendants.

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Randolph, Rogers, Tatel, Garland,* Brown, Griffith, and Kavanaugh, Circuit Judges, and Edwards and Williams, Senior Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7157 **September Term 2007**

Dawn V. Martin,
Appellant

Filed On:
March 31, 2008

v.

Howard University, et al.,
Defendants.

BEFORE: Henderson, Circuit Judge, and Edwards and Williams, Senior Circuit Judges

ORDER

Upon consideration of the motion for sanctions, and the opposition and reply thereto, it is

ORDERED that the motion be denied.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk

BY: /s/

Cheri Carter Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7157 **September Term 2007**

Dawn V. Martin,
Appellant

Filed On:
April 7, 2008

v.

Howard University, et al.,
Defendants.

BEFORE: Henderson, Circuit Judge, and Edwards and Williams, Senior Circuit Judges

ORDER

Upon consideration of appellant's March 31, 2008 motion for sanctions, it is

ORDERED that the motion be denied.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk

BY: /s/
Cheri Carter Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7157 **September Term 2007**

Dawn V. Martin,
Appellant

Filed On:
April 11, 2008

v.

Howard University, et al.,
Defendants.

BEFORE: Henderson, Circuit Judge, and Edwards and Williams, Senior Circuit Judges

ORDER

Upon consideration of appellant's motions for reconsideration, it is

ORDERED that the motions for reconsideration be denied. The Clerk is directed not to accept any further motions from appellant concerning sanctions or reconsideration of sanctions.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk

BY: /s/Michael C. McGrail Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7157 **September Term 2007**
Filed On: June 4, 2008

MANDATE

Dawn V. Martin,
Appellant
v.

Howard University, et al.,
Defendants.

BEFORE: Henderson, Circuit Judge, and Edwards and Williams, Senior Circuit Judges

JUDGMENT

This cause was considered on the record from the United States District Court for the District of Columbia, and was briefed and argued by counsel. It is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed for the reasons set forth in the accompanying memorandum.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See FED. R. APP. P.

41(b) D.C. Cir R. 41.

Per Curiam

FOR THE COURT

Mark J. Langer, Clerk

By: Michael C. McGrail

Deputy Clerk

United States Court of Appeals

for the District of Columbia Circuit

By: Deputy Clerk /s/

*1999 U.S. Dist. LEXIS 19516, *; 81 Fair Empl. Prac. Cas. (BNA) 964; 15 BNA IER CAS 1587*

DAWN V. MARTIN, Plaintiff, v. HOWARD UNIVERSITY, et al., Defendants.

Civ. No. 99-1175 (TFH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1999 U.S. Dist. LEXIS 19516; 81 Fair Empl. Prac. Cas. (BNA) 964; 15 BNA IER CAS 1587

December 15, 1999, Decided
December 16, 1999, Filed

DISPOSITION: [*1] Defendants' Motion to Dismiss the Complaint or in the Alternative for Summary Judgment granted in part and denied in part.

COUNSEL: For Plaintiff(s): James William Martin, Esq., Wood, Bohm & Francis, Washington, D.C. For Defendant(s): Leroy T. Jenkins, Jr., Esq., Nadine Chandler Wilburn, Esq., William Chappele Robinson, Esq., Office of Legal Affairs, Washington, D.C.

JUDGES: Thomas F. Hogan, United States District Judge.

OPINION BY: Thomas F. Hogan

OPINION: MEMORANDUM OPINION

Pending before the Court is Defendants' Howard University, Howard University School of Law, President H. Patrick Swygert and Dean Alice Bullock (in her official capacity only) Motion to Dismiss the Complaint or in the Alternative for Summary Judgment. After careful consideration of the Defendants' Motion, the Plaintiff's Opposition, the Defendants' reply, and the entire record herein, this Court will grant Defendants' Motion to Dismiss or in the Alternative for Summary Judgment with respect to the intentional infliction of emotional distress claim and with respect to the suits against Dean Bullock and President Swygert in their official capacities. On all other counts, Defendants' Motion will be denied because those [*2] claims present material issues of fact which must be decided by a jury.

Background

Plaintiff Dawn Martin was a Visiting Associate Professor at Howard University School of Law from July 1996 through May 1998. She brought this suit on May 14, 1999 against Howard University, Howard University School of Law, Alice Gresham Bullock, Dean of the Law School (in both her individual and official capacities), and H. Patrick Swygert, President of Howard University (in both his individual and official capacities), alleging that she has been the victim of a hostile work environment in violation of Title VII and the District of Columbia Human Rights Act (DCHRA). Plaintiff also filed claims of retaliation, intentional infliction of emotional distress, and breach of contract. In her

first amended complaint filed on July 7, 1999, Plaintiff withdrew her claim against Mr. Swygert in his individual capacity.

Plaintiff alleges that she has been the victim of hostile work environment sexual harassment as a result of the conduct of Mr. Leonard Harrison, a homeless person who resided in a shelter and was neither an employee nor a student of the University but who regularly used Howard University's [*3] Law School library. Specifically, Plaintiff claims that Defendants knowingly allowed Mr. Harrison, a man characterized by the D.C. Metropolitan Police Department as a "stalker" with a criminal record and history of violence, free access to the law school campus and buildings, thereby facilitating his sexual harassment of Plaintiff in her workplace. Due to this alleged inaction, Plaintiff claims that Defendants have violated both Title VII and the DCHRA as well as caused her intentional infliction of emotional distress. Plaintiff also claims that due to her complaints, Defendant Bullock took retaliatory measures, on five different occasions, to ensure that Plaintiff was not offered a permanent professorship or a renewed visitorship at the Law School. Furthermore, Plaintiff alleges that Defendants Howard University and Howard University School of Law breached their contract with Plaintiff in failing to renew her contract or selecting her for a tenure-track position in violation of Professor Taslitz's alleged oral promise to Plaintiff that she would placed into a tenure track position as soon as one became available. And finally, Plaintiff claims that she was forcefully and prematurely [*4] evicted

from her office in retaliation for her filing of a charge with the U.S. Equal Employment Opportunity Commission ("EEOC").

Applicable Law

Rule 12(b)(6) of the Fed. R. of Civ. P. permits the dismissal of complaints, which, on the face of the pleading, assuming all allegations to be true, fails to state a claim under which relief can be granted.

Rule 56 of the Fed. R. Civ. P. provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." The moving party for summary judgment has the burden of showing the absence of a genuine issue of material fact. Adickes v. S.H. Kress and Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970).

Discussion

I. Suits Against Dean Bullock and President Swygert in Their Official Capacity

Defendants claim that this Court should dismiss Plaintiff's Title VII and DCHRA claims against Dean Bullock and President Swygert in their official capacity because in cases where an agent has been sued [*5] in his official capacity and the employer has also been sued, the lawsuit against the

individual in his official capacity "merges" into the lawsuit against the employer. See Gary v. Long, 313 U.S. App. D.C. 403, 59 F.3d 1391, 1399 (D.C. Cir. 1995) (dismissing claims filed against a supervisor in his official capacity under Title VII, reasoning that the suit against the supervisor in his official capacity was really a suit against the employer and therefore that the claims against the supervisor "merge" with those against the employer). n1 Therefore, since Howard University and Howard University School of Law are defendants in this matter, Plaintiff's claims against Dean Bullock and President Swygert in their official capacity should be dismissed.

----------Footnotes----------

n1 The DCHRA also prohibits an "employer" from discriminating against employees. D.C. Code § 1-2502(10). In analyzing employment discrimination cases under the DCHRA, courts in this jurisdiction have looked to Title VII and the applicable caselaw under Title VII for guidance. See Daka, Inc. v. Breiner, 711 A.2d 86, 92 n.14 (D.C. 1998).

----------End Footnotes----------

[*6]

II. Hostile Work Environment Sexual Harrassment

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ."

42 U.S.C. § 2000e-2(a)(1). ☒Sexual harassment is considered discrimination on the basis of sex in violation of Title VII. Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 64, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986).

☒To be actionable, a plaintiff must establish that the sexual harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Meritor, 477 U.S. at 67. ☒In determining whether an environment is "hostile" or "abusive," the court should consider the totality of the circumstances. Harris v. Forklift Systems, Inc., 510 U.S. 17, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). Specifically, a court should consider the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it [*7] unreasonably interferes with an employee's work performance; and the effect on the employee's psychological well-being. Id.

☒An employer may be held liable for a hostile work environment that is created by a non-employee, including those non-employees who were invited or permitted to remain on an employer's premises. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1992) ("the environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers in the workplace."); see also 29 C.F.R. § 1604.11(e) (EEOC Guidelines) ("An employer may also be responsible for the acts of non-employees with

respect to sexual harassment of employees in the workplace. . . "). To prevail against an employer in these cases, a plaintiff must show that the employer knew or should have known of the existence of a hostile work environment and failed to take proper remedial action. Henson, 682 F.2d at 903. Consequently, although Mr. Harrison was not a University employee, the University may be responsible for his conduct if it knew or should have known that Mr. Harrison's actions created a hostile [*8] work environment for the Plaintiff and failed to take corrective action. Id. In determining whether an employer should be responsible for a hostile work environment caused by a non-employee, courts consider the extent of the employer's control over the harasser and any other legal responsibility which the employer may have with respect to the conduct of the non-employees. Otis v. Wyse, 1994 U.S. Dist. LEXIS 15172, 1994 WL 566943 at *7 (D. Kan., Aug. 24, 1994).

In this case, Defendants admit that the sufficiency of the University's response is a factual question for the jury but they contend that Plaintiff's hostile work environment claim must be dismissed because Plaintiff cannot establish a prima facie case of hostile work environment under Title VII. Specifically, Defendants claim that Plaintiff cannot show that Mr. Harrison's conduct was based on sex and that Mr. Harrison's conduct was sufficiently severe or pervasive.

A. The Alleged Harassment Must Be Based on Sex

Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed solely at discrimination because of sex. Oncale v. Sundowner Offshore Services, 523 U.S. 75, 118 S. Ct. 998, 1001, 140 L. Ed. 2d 201 (1998). [*9] Workplace harassment is not automatically discrimination because of sex merely because the words used have sexual content or connotations. Id. "The critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Id.

Here, Plaintiff alleges that Mr. Harrison sent her two letters, left three voice mail messages for her and attempted three personal visits to Plaintiff's office, all due to his conviction that she was his "wife." Plaintiff contends that these interactions with Mr. Harrison convinced her that this "mentally unstable homeless stranger" had conducted research on her since he knew her middle name and the name of a course which she taught in Cleveland. Moreover, Plaintiff refers to a letter written by Mr. Harrison to Attorney Valerie Edwards in Canada as evidence that Mr. Harrison's pursuit of Plaintiff was sexual in nature: "Verily, it appeared that this Valerie Edwards look-alike was actually a taller, more youthful, prettier and (forgive me for saying) more voluptuous woman than the Valerie Edwards whom I had met and known at Lakeside. . . .The truth is, I had never [*10] looked at Valerie Edwards full in

the face, on account of painful bashfulness -- while enamored by her person and both distracted and infatuated with her legs -- and so was not aware of her exact features." It is clear from Mr. Harrison's own description of his search for "Geneva Crenshaw" or "Valerie Edwards" that he targeted women other than Plaintiff: "the only method available to me as far as finding Valerie was the most primitive means of choosing the name 'Valerie' from within the vast array of academic category and pursuing it. Eventually, I had lost even the name 'Valerie' and pursued others." Plaintiff argues that Mr. Harrison's pursuit of her as his "wife" was inherently sexual in nature since it was clear that Plaintiff was being pursued as a woman and that she would not have been sought by Mr. Harrison as his wife if she were a man. Moreover, Plaintiff claims that she was being stalked by Mr. Harrison and that stalking is primarily a crime against women, with sexual connotations.

A hostile work environment may be established if the harassment is "because of sex," even if not sexual in nature. Spain v. Gallegos, 26 F.3d 439 (3d Cir. 1999); Hicks v. Gates Rubber Co., 928 F.2d 966, 971 (10th Cir. 1991); [*11] Hall v. Gus Const. Co., Inc., 842 F.2d 1010 (8th Cir. 1988). In this case, it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female; therefore, the alleged stalking activities do appear to have been "because of sex" even if they were not inherently sexual in nature. Therefore, the Court cannot dismiss Plaintiff's hostile work environment claim on

the ground that Mr. Harrison's activities did not constitute sexual harassment.

B. Sexual Harassment Must be Severe and Pervasive

Defendants also claim that Plaintiff's hostile work environment claim should fail because Mr. Harrison's conduct was not severe or pervasive as a matter of law. The legal standard for determining a hostile or abusive work environment was set out by the Supreme Court in Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). "A court must consider: (1) the frequency of the discriminatory conduct, (2) whether it was physically threatening or humiliating or a mere offensive utterance; and (3) whether it unreasonably interferes with an employee's work performance. The severity or seriousness of [*12] the alleged conduct varies inversely with the pervasiveness or frequency of the conduct; in other words, "one act may be sufficient if it is particularly severe while less intense incidents may be sufficient if numerous." See Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1029 (D. Nev. 1992). Moreover, the Court must consider both the victim's subjective impressions of this activity and whether the alleged actions would constitute unlawful sexual harassment from the perspective of a reasonable victim.

In this case, Plaintiff alleges eight instances of sexual harassment: two letters, hand-delivered to Plaintiff's office; three phone calls to Plaintiff's direct line which were picked up by her voice mail; and

three personal visits to Plaintiff's office, although Plaintiff was out of her office during the first two visits and the Security Officer chased Mr. Harrison from her office at the third visit. Plaintiff has alleged, and the Defendants do not appear to dispute, that she subjectively felt threatened by Mr. Harrison's behavior; however, to prevail on a sexual harassment claim, Plaintiff must also show that a reasonable female would have found these actions [*13] to be severely hostile or abusive. Whether or not Mr. Harrison intended his behavior to be abusive or threatening is irrelevant to this inquiry. See Powell, 841 F. Supp. at 1029 ("The reasonable victim standard classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile work environment. . . . Therefore, the alleged harasser's intent is unimportant and "compliments" are not a defense.")

The alleged incidents in this case may or may not be sufficiently severe or pervasive to amount to actionable sexual harassment. However, they certainly amount to more than the "mere utterance of an epithet." Meritor, 477 U.S. at 67 ("mere utterance of an. . . epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficient degree to violate Title VII). Whether or not a reasonable victim would find them sufficiently severe or pervasive to alter the conditions of Plaintiff's employment and create an abusive working environment is appropriately an issue of fact for the jury, not one which this Court can summarily adjudicate. See

Powell, 841 F. Supp. at 1029 [*14] (holding that whether two incidents of verbal abuse -- "great tits" and "great legs" -- and three incidents of staring by non-employees constituted sexual harassment of plaintiff was a triable issue of fact). Therefore, since the Court finds that Mr. Harrison's conduct could be considered sexual harassment and that the question of whether this behavior was sufficiently severe or pervasive to be actionable is a jury question, and since Defendants admit that there is a material dispute regarding whether the University took appropriate actions in connection with Mr. Harrison, the Court must deny Defendants' Motion to Dismiss or Alternatively for Summary Judgment with regard to the Hostile Work Environment claim.

III. Retaliation

☒Title VII makes it illegal for an employer to take adverse employment actions against an employee for engaging in activity protected by the statute. See 42 U.S.C. § 2000e-3. ☒In order to establish a prima facie case of retaliation, Plaintiff must show that: (1) she was engaged in protected activity under Title VII, (2) she was subjected to adverse employment action, (3) and a causal connection exists between the protected [*15] activity and the adverse action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1973); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Barnes v. Small, 268 U.S. App. D.C. 265, 840 F.2d 972, 976 (D.C. Cir. 1988).

Plaintiff asserts that Dean Bullock took five separate actions against her because she complained about a hostile work environment and requested protection from Mr. Harrison. Specifically, Plaintiff alleges that Dean Bullock retaliated against her by: (1) denying her application for a permanent EEO position at the Law School on December 18, 1997; (2) failing to authorize the Appointment Promotion and Tenure ("APT") Committee to fill vacant positions in January, 1998, because she believed the ATP Committee would recommend Plaintiff for one of these positions; (3) converting a Constitutional Law/Civil Rights position into a Tax/Trusts and Estates position in April 1998 so that the APT Committee could not consider her for the position; (4) leaving a tenure-track position vacant in the Spring of 1998, so that the APT Committee would not consider Plaintiff [*16] for the position; (5) ordering Plaintiff on May 26, 1998, to vacate her office by Friday, May 29, 1998, and actually "forcing" her out of the office in early June 1998.

Plaintiff alleges that Defendants were initially placed on legal notice of her protected activities when she reported Mr. Harrison's letters and voice-mails to Associate Dean Michael Newsom on November 20, 1997. At the latest, Plaintiff claims that she engaged in protected activity as a result of her November 25, 1997 letter, advising Dean Bullock about Mr. Harrison's conduct and criticizing the level of security on campus. Defendants argue that this letter made no mention of Title VII or other law and therefore contained no information that would

communicate that Plaintiff believed that she had been the victim of a hostile work environment under Title VII. Therefore, Defendants contend that Plaintiff did not engage in protected activity until she filed a charge with the EEOC and that Dean Bullock could not have retaliated until she learned of this EEOC complaint. Following Defendants' reasoning the only act that could be considered retaliatory was the alleged early eviction from her office. Defendants assert that [*17] Plaintiff cannot prevail on this claim because she cannot prove a material adverse change in the terms or conditions of her employment. With respect to this early eviction claim, the Court finds that this is a material issue of fact for the jury and not one which can be disposed of pursuant to summary judgment.

With respect to the other four alleged adverse actions, this Court does not read Title VII to suggest that the protections afforded by this statute against retaliation are only available against individuals who have filed formal charges with the EEOC. See Brandau v. State of Kansas, 968 F. Supp. 1416, 1421-22 (D. Kansas 1997) (holding that it was undisputed that plaintiff had engaged in protected opposition to discrimination because she spoke directly with the alleged harasser and reported his conduct to her supervisors); Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1025 (D. Nev. 1992) (holding that where the harasser is a non-employee, protected opposition under Title VII includes the statement to the employee, "I don't have to take this," or a simple request to the employer to "do something."). Moreover, whether or not Plaintiff's

[*18] letter was sufficiently detailed to put Dean Bullock on notice that she believed she had been the victim of a hostile work environment is a question of fact for the jury. See Howard U. v. Green, 652 A.2d 41, 46 (D.C. App., 1994) (holding that there are no "magic words" which must be chanted in order to invoke Title VII protection), citing EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1012-1013 (9th Cir. 1983). Since an EEOC complaint is not a legal prerequisite for a retaliation claim and since the Court cannot find that no reasonable juror could decide that Plaintiff had engaged in "protected activity" under Title VII when she informed Dean Bullock of Mr. Harrison's activities and complained about what she felt was the inadequacy of campus security, Defendants' motion for summary judgment on the other four retaliation claims must also be denied. n2

----------Footnotes----------

n2 To the extent that the causal connection is in dispute, the Court finds that since the Plaintiff's complaints about Mr. Harrison and campus security were closely followed by the alleged adverse actions, a sufficient causal connection has been established to create a triable issue of material fact with regard to Plaintiff's retaliation claims. See Ramirez v. Oklahoma Dep't of Mental Health, 41 F.3d 584, 596 (10th Cir. 1994) (adverse action a month and a half after protected activity constituted circumstantial evidence of retaliation).

----------End Footnotes----------

[*19]

IV. Intentional Infliction of Emotional Distress

To establish a claim for intentional infliction of emotional distress, a plaintiff must prove that the defendant engaged in: (1) extreme and outrageous conduct that (2) intentionally or recklessly caused (3) severe emotional distress to another. King v. Kidd, 640 A.2d 656, 667 (D.C. 1993). Generally, these claims are reserved for behavior that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." Sere v. Group Hospitalization, Inc., 443 A.2d 33, 37 (D.C. 1982). Although action that violates public policy, including discrimination, can constitute such extreme and outrageous conduct, the discrimination allegations must be "particularly egregious, such as the pattern or campaign of harassment, intimidation or abuse, to rise to the level of extreme and outrageous conduct. Richardson v. Bell Atlantic Corp., 946 F. Supp. 54, 77 (D.D.C. 1996). Even assuming all of the allegations in Plaintiff's complaint are true, this Court cannot find that a reasonable [*20] juror would deem them to be sufficiently outrageous or extreme to rise to the level of intentional infliction of emotional distress. Therefore, Defendants' motion for summary judgment with respect to the claim of intentional infliction of emotional distress is granted.

V. Breach of Contract

In Count IV of the complaint, Plaintiff alleges that Howard University breached its contract with her by "not considering her, in good faith, for available permanent positions with Howard." Defendants argue that this breach of contract claim is barred by the Statute of Frauds since they assert that it is based upon oral representations made by Professor Taslitz, Vice-Chair of the APT Committee, to Plaintiff before she accepted the position with the University. Plaintiff argues that these oral representations induced her to accept the position because Professor Taslitz had suggested to her that she would be placed in the next available tenure track position.

The District of Columbia Statute of Frauds reads as follows:

> An action may not be brought. . . upon an agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action [*21] is brought, or a memorandum or note thereof, is in writing. . . and signed by the party to be charged therewith or a person authorized by him.

D.C. Code § 28-3502. However, the Statute of Frauds has been interpreted in this Circuit to apply only to those contracts whose performance could not possibly or conceivably be completed within one

year. Hodge v. Evans Financial Corporation, 262 U.S. App. D.C. 151, 823 F.2d 559, 561 (D.C. Cir. 1987) (holding that "the enforceability of a contract under the statute does not depend on the actual course of subsequent events or on the expectations of the parties" but rather "applies only to those contracts whose performance could not possibly be conceivably be completed within one year.")

The question in this case is whether the tenure-track position which Professor Taslitz allegedly promised Plaintiff could have become available within one year of Plaintiff's acceptance of Defendant's offer of employment. Defendants argue that the tenure-track position could not have been offered to Plaintiff until the expiration of her two-year contract with the University. Plaintiff argues that this agreement could have been performed [*22] within one year if a tenure track position had become available within that one-year period because her contract did not preclude her from taking a tenured position. Based on the pleadings before the Court, this issue presents factual questions that cannot be resolved by the Court as a matter of law pursuant to a motion to dismiss or a motion for summary judgment. Whether or not Professor Taslitz had authority to bind the University and whether the University could have offered Plaintiff the tenure track position before her two-year term had expired are material factual disputes which are more appropriately left to a jury. Therefore, Defendants' Motion to Dismiss or Alternatively for Summary Judgment on the Breach of Contract claim must be denied.

Conclusion

For the foregoing reasons, based on the briefs before this Court and the entire record herein, Defendants' Motion to Dismiss or Alternatively for Summary Judgment is granted in part and denied in part. The suits against Dean Bullock and President Swygert in their official capacities will be dismissed and Plaintiff's intentional infliction of emotional distress claim will also be dismissed. All remaining claims present material [*23] disputes of fact which are more appropriately left to a jury; therefore, Defendants' Motion with respect to the hostile work environment, retaliation, and breach of contract claims is denied. An order will accompany this opinion.

December 15th, 1999

Thomas F. Hogan /s/
United States District Judge

ORDER
In accordance with the accompanying memorandum opinion, it is hereby

ORDERED that Defendants' n1 Motion to Dismiss the Complaint or in the Alternative for Summary Judgment is granted in part and denied in part. Specifically, it is

ORDERED that Defendants' Motion is granted with respect to the suits against Dean Bullock and President Swygert in their official capacities and with respect to the intentional infliction of emotional distress claim. And it is further

ORDERED that Defendants' Motion is denied with respect to the hostile work environment sexual harassment, retaliation, and breach of contract claims.

----------Footnotes----------

n1 This motion was brought by Defendants Howard University, Howard University School of Law, President H. Patrick Swygert, and Dean Alice Gresham-Bullock (in her official capacity only); this Order affects these moving parties only.

----------End Footnotes----------
[*24]

December 15th, 1999
Thomas F. Hogan /s/
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN,

Plaintiff,

v.

HOWARD UNIVERSITY, et al., Defendants.

No. 99-1175 (TFH/JMF)
May 31, 2001

MEMORANDUM OPINION AND ORDER

Before me for resolution are the following motions: Plaintiff's Motion for Reconsideration of Magistrate Judge's Ruling [#95]; Plaintiff's Motion for Sanctions for Defendant's Continuing Refusal to Provide a Proper Answer [#99]; Plaintiff's Motion for an Order to Show Cause was Defendant Should Not be Held in Contempt for Violation of Court's Order [#100] and Defendant's Motion to Late File Opposition to Plaintiff's Motion for Reconsideration [4102].

BACKGROUND

Plaintiff Dawn V. Martin, a visiting professor

at Howard University Law School from July 1996 until May 1998, brings this lawsuit against Howard University, Howard University Law School, and Dean Alice Gresham-Bullock in her individual capacity, alleging hostile work environment in violation of Title VII and the District of Columbia Human Rights Act ("DCHR"), retaliation and breach of contract. See Martin v. Howard University, et al., 1999 U.S. Dist. LEXIS 19516 (D.D.C. 1999). With respect to her hostile work environment claim, plaintiff alleges that defendants knowingly permitted Leonard Harrison, a non-employee of the University with a criminal record, to sexually harass plaintiff in her workplace. Id. at *3. Plaintiff further alleges that as a result of her complaints to defendants about Harrison's behavior, defendants chose not to offer plaintiff a permanent position on the Howard University Law School ("HULS") faculty, or to renew her visitorship at the Law School. Id. Finally, plaintiff asserts breach of contract arising from the alleged failure to renew plaintiff's contract or to offer her a tenure-track position. Id.

The factual and procedural history of this case have been repeated exhaustively in prior opinions and the parties' own pleadings. and the Court will not review them again here. However, the procedural backdrop of the motions pending before me merits further discussion. On April 11, 2001. this Court issued an Order resolving outstanding discovery disputes related to interrogatories, requests for documents, and

depositions in this case. That Order granted plaintiff's Motion to Compel as to the majority of her interrogatories and document requests and directed defendant Howard University to provide plaintiff with the discovery materials compelled by the Order within twenty-one days of the date of the order, i.e., by May 1, 2001. Order of April 11, 2001 at 6. Additionally, the Order directed the parties to confer with one another to create a deposition schedule and warned that "unreasonable refusal to agree" to a schedule would be deemed sanctionable. Id. at 1-2.

On April 23, 2001, plaintiff filed a Motion for Reconsideration of this Court's April 11, 2001 Order, simultaneously seeking reconsideration of a portion of that Order, clarification of particular rulings set forth in the Order, and resolution of certain matters which plaintiff asserts are still outstanding. Plaintiff subsequently filed three Status Reports with this Court, dated April 30, 2001, May 2, 2001, and May 15, 2001, asserting that defendant Howard University had failed to follow the Court's order regarding deposition scheduling, and failed to provide the plaintiff with the discovery materials ordered by this Court. Plaintiff also filed a Motion for Order to Show Cause why defendant should not be held in contempt for its persistent failure to comply with this court's Order.

In a letter to plaintiff dated May 2, 2001, defendant Howard University indicated that defendant's

attorney was "currently working on supplementing the discovery responses" pursuant to this Court's Order and indicated that plaintiff would receive this discovery "well in advance of the deposition dates proposed by Howard University. Plaintiffs Status Report of May 15, 2001, Ex. A. Although the May 1st discovery deadline set forth in this Court's Order had now passed, defendant Howard University had neither provided plaintiff with the discovery ordered by this Court, nor filed any notice or motion seeking an extension of time. On May 18, 2001, eighteen dates after the discovery deadline set in this case and well after the filing deadline for a response to plaintiffs Motion for Reconsideration,[1] defendant filed a Motion to Late File Opposition to Plaintiffs Motion for Reconsideration. Plaintiffs Opposition to that motion indicates that as of May 22, 2001, defendant has provided no discovery to plaintiff as directed by this Court's April 11, 2001 order. Plaintiffs Opposition to Motion to Late File at 12.

On May 29, 2001, plaintiff filed a pleading with this Court indicating that defendant Howard

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[1] LcvR 7.1(b) sets forth the deadline for filing an opposition to a party's motion: "Within 11 days of the date of service or at such other time as the court may direct, an opposing party shall serve and file a memorandum of points and authorities in opposition to the motion. If such a memorandum is not filed within the prescribed time, the court may treat the motion as conceded."

University has provided plaintiff with responses to Document Requests ## 2, 3, 4, 5, 7, 8, 9, 10, 11, 16, 17, 21 and 23 as ordered by this Court on April 11, 2001. See Plaintiff's Response to Defendant's May 25, 2001 Supplement to Discovery at 3. These responses. apparently provided to plaintiff on May 25, 2001, come twenty-five days after they were due. Further, there is no indication in plaintiff's filing, or in the exhibit that references the supplemental response by defendant, that defendant has provided plaintiff with responses to her interrogatories as ordered.

DISCUSSION

As a preliminary matter, I will first resolve the issue of Howard University's failure to comply with this Court's Order of April 11, 2001. The May 1' discovery deadline set by this Court passed without any indication from defendant that it could not meet this deadline. Defendant did not take any measures to seek relief from the May 1St deadline. Rather, the defendant merely allowed the deadline to lapse without any response whatsoever. Defendant filed no pleadings in this case until May 18, 2001, when it sought leave to file a late response to plaintiff's motion for reconsideration.

Defendant's flagrant disregard for this Court's Order is unacceptable. Accordingly, Howard University shall show cause in writing within ten (10) days of the date of this order why Howard University and its counsel should not be held in contempt for failure to comply with this

Court's order of April 11, 2001, directing defendant to provide plaintiff with answers to her interrogatories and document requests as compelled by the Order, and why defendant University should not be precluded from presenting a defense in this case altogether. Plaintiff shall have ten (10) days thereafter to file a response to defendant's and counsel's show cause statements.

The Court notes that because of the possibility that their interests may conflict, defendant Howard University and its counsel, Mr. Lattimore, must be represented by separate counsel for the purpose of this show cause statement.

Further, defendant's Motion to Late File an Opposition to plaintiffs Motion for Reconsideration is denied.

After disregarding this Court's order of April 11, 2001, and failing to respond to plaintiffs motion for reconsideration within the requisite time period, defendant offers the following explanation:

> At the time the order was issued, the undersigned counsel was in litigation a high-profile employment discrimination case in Superior Court involving two defendants. *Young v. Howard University.* The trial lasted two weeks. . . . Thereafter, the undersigned counsel was out of the office for a few days due to health reasons. Upon

> returning to the office, he has been in depositions, filed a pretrial statement. . . and had a pretrial conference. . . . Accordingly, Howard University has just had an opportunity to respond to plaintiffs lengthy motion.

Defendant's Motion to Late File Opposition at 2-3.

This court appreciates defense counsel's obligation to other courts and lawsuits. However, these obligations can never justify a party's failure to respond altogether to a Court's Order, or its disregard for the time deadlines set by our Local Rules. Given defendant's conduct, defendant will not be permitted an opportunity to respond to plaintiffs Motion for Reconsideration.

The Court will now turn to consideration of plaintiffs motions.

A. Motion for Reconsideration and Related Motions

Plaintiffs Motion for Reconsideration of this Court's April 11, 2001 Order seeks the following: 1) an Order directing defendant Howard University to provide good faith answers to plaintiffs First Amended Complaint; 2) good faith answers to Interrogatories Number 50, 55, 57 and 59 and reconsideration of this Court's ruling on Interrogatories Number 24, 26, 28, 30 and 36; 3) reconsideration of this Court's ruling on Document Requests Number 6, 21 and 22; 4) an Order holding all depositions in abeyance until plaintiff

receives the discovery that was ordered by this Court in its April 11, 2001 Order, as well as additional discovery matters that are the subject of this Order, and reconsideration of this Court's Order imposing witness fees on plaintiff related to depositions in this case; 5) clarification of this Court's ruling on Defendant's First Motion for Protective Order; 6) clarification of this Court's ruling on Defendant's Second Motion for Protective Order; and 7) clarification of this Court's ruling on defendant's Motion for Sanctions and resolution of plaintiff's renewed request for sanctions against defendant.

I will address each of plaintiff's requests in turn.

1. Plaintiff's First Amended Complaint

Plaintiff claims that Defendant Howard University's Answer to Plaintiff's First Amended Complaint is not an answer at all, but rather a list of "perfunctory denials" which reflects a failure to make reasonable inquiry into the facts asserted by plaintiff. Plaintiff's Motion for Reconsideration ("Pl. Mot. Rec.") at 20. Plaintiff alleges that Defendant's Answer repeatedly denies undisputed facts and facts admitted to by Dean Alice Gresham-Bullock, who answered the same First Amended Complaint in her individual capacity, and is generally inconsistent with Dean Gresham-Bullock's Answer. Pl. Mot. Rec. at 20. According to Plaintiff, reasonable inquiry by the defendant would necessarily include consultation with Dean Bullock, since Bullock was the "Howard official with

knowledge of these events" and the highest ranking official at the Howard law school."

Defendant Howard University does not directly respond to plaintiff's assertions regarding the alleged deficiencies in defendant's Answer. Instead, in Defendant's Opposition to Plaintiff's Motion to Compel ("Def. Opp."), defendant states that, "[p]laintiff Martin may be barred under the doctrine of laches from raising such an argument or claim so late in the litigation process– a year after HU provided answers to her amended complaint." Def. Opp. at 6, n.6. Defendant cites no case law or other authority to support its conclusory claim of laches and offers no analysis whatsoever of the issue. The Court therefore finds that defendant has not met its burden as to the laches argument.

Plaintiff, in a related filing, argues for Rule 11 sanctions against Howard University for failure to provide a "proper answer" to her First Amended Complaint. Motion for Rule 11 Sanctions for Defendant's Continuing Refusal to Provide a Proper Answer. Insofar as there are inconsistencies between defendant Howard University's answers and the information provided by Dean Bullock in her answer to plaintiff's First Amended Complaint, the statements of Dean Bullock are deemed admissible, even though Howard University may have denied them, and may be used against Howard University.[2] Fed. R. Evid. 801(d)(2)(D).

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[2] Plaintiff states "Since Dean Bullock was the Howard official with knowledge of these events, and is the highest-ranking official at the Howard law school, any 'reasonable

This means that in any Motion for Summary Judgment that plaintiff seeks to file, plaintiff is permitted to cite the statements of Dean Bullock in support of any assertion plaintiff may make that there is no genuine issue as to any material fact. Since the statements are admissible because of the Federal Rules of Evidence, there is no need to grant plaintiff any additional relief. Therefore, her Motion for Rule 11 Sanctions is denied.

2. Interrogatories

a. Interrogatories Number 50, 55, 57 and 59

Plaintiff's original Motion to Compel sought affirmative answers to Interrogatories Number 50, 55, 57 and 59. Interrogatory Number 50 asks defendant to "[s]tate whether the Defendant regards the policy and rules in the handbook as binding upon Howard University and Howard University Law School." Defendant objects on the grounds that the term "handbook" is vague and claims it has no knowledge of what handbook plaintiff is referring to. Del Opp., Exhibit ("Ex.") 4, at 24. Plaintiff responds that she is clearly referring to the I loward University Handbook, which plaintiff claims she requested from the University and in fact received from the them.

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inquiry' in this case would clearly have begun by reviewing the questions with Dean Gresham-Bullock. Since Dean Gresham-Bullock's Answer directly conflicts with that of the Defendant University, it is clear that counsel for Howard [made] absolute no effort to ascertain true answers to the First Amended Complaint..." Plaintiff's Motion to Compel at 6.

Plaintiff s motion to compel an answer to Interrogatory Number 50 is granted. Defendant shall answer this Interrogatory with reference to the Howard University Handbook.

Interrogatory Number 55 asks defendant to "[p]lease explain why plaintiff was not qualified for the Equal Employment Opportunity labor Law professor position that was advertised for the 1998-99 academic year." Defendant refers plaintiff to its answer to Interrogatory Number 30, which asked defendant to "[s]tate the reason defendant did not renew Plaintiff's employment contract and the reason defendant did not approve Plaintiff for a permanent employment position." Del Opp., Ex. 4, at 25. Plaintiff asserts that defendant's reference to its answer to Interrogatory Number 30 is insufficient because Interrogatory Number 55 is a separate. distinct inquiry which focuses specifically on the EEO/Labor law position and why plaintiff was not qualified for it. Pl. Mot. at 33. This court agrees. Plaintiff is entitled to a separate answer to this more narrow and distinct inquiry related to the specific EEO/Labor Law position and plaintiff's qualifications or lack thereof for this position.

Interrogatory Number 57 asks defendant to "[p]lease identify the period that Professors

Betsy Levin, Christi Cunningham and Patricia Worthy were employed as visitor professors at the Howard University Law School." Defendant objects that this information is not relevant and not calculated to lead to the discovery of relevant

information. Def. Opp., Ex. 4, at 26. Plaintiff responds that these persons are "comparators" to her, and that defendant's "policies and practices" with respect to other visiting professors are "supremely relevant" to the issue of disparate treatment. Pl. Mot. at 34.

A plaintiff in a Title VII case must frame her case within a specific burden-shifting structure, and it is the plaintiff who ultimately bears the burden of persuading the court that an employer's proffered reason for the challenged employment decision is merely a pretext for discriminatory purpose. See, e.g., McDonnell Douglas Corp v. Green, 411 U.S. 792, (1973); United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983); Mungin v. Katten Muchin & Zavis, 116 F.3d 1549, 1553-54 (D.C. Cir. 1997). A plaintiff may ultimately prove discrimination with direct evidence of discriminatory intent or by demonstrating disparate treatment or disparate impact. See Neuren v. Adduci, Matsrian, Meeks & Schill, 43 F.3d 1507, 1513-14 (D.C. Cir. 1995); Christohper v. Billington, 43 F. Supp.2d 39, 50 (D.D.C. 1999).

Based on plaintiff's amended complaint and subsequent pleadings filed in this case, plaintiff appears to be pursuing a theory of discriminatory intent and disparate treatment. In order to create an inference of disparate treatment in a Title VII case, a plaintiff must prove that "all of the relevant aspects of her employment situation are 'nearly identical' to those of the employees who she alleges were treated more favorably." See Neuren v. Adduci, 43 F.3d at 1514 (citing Pierce v.

Commonwealth Life Ins. Co., 40 F.3d 796, 802 (6th Cir.1994)). Plaintiff's Interrogatory Number 57, which seeks information related to the employment period of other visitor professors at HULS, is relevant to the disparate treatment inquiry because it bears on one facet of plaintiffs employment situation at Howard University that may be identical to these other employees. If plaintiff can establish that she worked for the University during a related period as these visitor professors, she may be able to establish these professors as comparators. Plaintiffs motion to compel Interrogatory Number 57 is therefore granted.

Finally, Interrogatory Number 59 asks defendant to "[p]lease explain Secretary Delphyne Bruner's role in transcribing the Plaintiff's law journal article in November 1997." Defendant's answer stated that Bruner was the Head Secretary for the law school who provided clerical support to MILS administrators and faculty. Further, defendant objected to this interrogatory as not relevant and not calculated to lead to relevant information. Def. Opp., Ex. 4, at 27. Plaintiff counters that the circumstances surrounding the retyping of plaintiffs article are relevant because the delayed completion and acceptance dates of plaintiff's article for publication are precisely the reasons defendant has cited for plaintiffs non-renewal and non-selection. Pl. Mot. at 34.

Plaintiff's motion to compel Interrogatory Number 59 is granted. Plaintiff must be permitted to explore this information, which bears on defendant's

decision not to renew plaintiffs contract and therefore goes to the issue of pretext. If plaintiff bears the burden of persuading the Court that defendant's proffered reason for not renewing her contract is a pretext, then information relating to the circumstances surrounding plaintiff's non-renewal is relevant. Accordingly, defendant shall provide plaintiff with an explanation of Bruner's role in transcribing plaintiff's law journal article in November 1997."

b. Motion to Reconsider Interrogatories, 24, 26, 28, 30 and 36

Plaintiff also seeks reconsideration of the Court's ruling on Interrogatories Number 24, 26, 28, 30 and 36. This Court denied plaintiff's motion to compel as to these Interrogatories on the grounds that plaintiff's objections to defendant's answers to these interrogatories asked the Court to rule on the "validity" of defendant's answers, which the Court indicated it could not do. Order of April 11, 2001 at 4. The Court has reviewed plaintiffs Motion for Reconsideration as to these five interrogatories and affirms its original determination.

As was the case with plaintiff's original motion to compel, plaintiffs motion for reconsideration asserts virtually the same arguments that plaintiff raised in her original motion to compel, namely, plaintiff challenges the veracity or validity of defendant's responses to these interrogatories. Pl. Mot. at 22-30; Pl. Mot. Rec. at 24-31. While in one instance, plaintiff offers additional evidence to strengthen

her argument, presenting an audio tape of a radio show on which an officer named Sirleaf allegedly spoke as to Leonard Harrison's criminal record,[3] plaintiffs underlying argument as to that interrogatory is the same. i.e., the Defendant's answer is fraudulent and dishonest. Pl. Mot. At 24. Plaintiff's motion for reconsideration of Interrogatories 24, 26, 28, 30 and 36 is denied. Plaintiff asks this Court to reconsider its ruling even though plaintiff relies on the same arguments she made her original motion. It is well-established law that a court should not grant a motion for reconsideration if a party merely recycles the same factual or legal arguments it made in the first instance. Consolidated Edison Co. of New York, Inc. v. O'Leary, 184 F.R.D. 1, 2 (D.D.C. 1998). "Reconsideration is not simply an opportunity to reargue facts and theories upon which a court has already ruled." Id. (citing New York v. United States, 880 F.Supp. 37, 38 (D.D.C. 1995); see also Assassination Archives & Research Ctr. v. Dept. of Justice, 828 F.Supp. 100, 102 (D.D.C. 1993)). Because plaintiff does not assert any new factual or legal arguments with respect to these Interrogatories, the Court will not reconsider its previous ruling on them.

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[3] Plaintiff offers this evidence with respect to Interrogatory Number 24, which asks defendant to "State how and when Defendant first became acquainted with Leonard Harrison's criminal record."

3. Document Requests

Plaintiff also seeks reconsideration of this Court's ruling on Document Requests Number 6, 21 and 22. Request Number 6 seeks "[t]he complete personnel file of Defendants, Alice Gresham Bullock, Esq., Howard University, and/or Howard University Law School, including but not limited to, any documents, records, memoranda, notes, or computer printouts which were part of Defendants' personal file and/or personnel file at any time." Request Number 21 asks defendant to "... produce the complete personnel files, including employment contracts, for all Howard University Law School tenured professors, visiting professors and professors on a tenure-track position, inclusive of Professors Christa Cunningham and Lateef Mtima." This Court denied plaintiff's motion to compel as to Document Request Number 6, stating that plaintiff was not entitled to the personnel files of "... anyone except for herself, and those individuals to whom she is being compared, i.e., Christa Cunningham and Lateef Matima." Order of April 11, 2001 at 6. In accordance with that determination, this Court granted in part plaintiff's motion to compel Number 21, permitting plaintiff the personnel files of Christa Cunningham and Lateef Mtima.

Plaintiff's motion for reconsideration asserts a new legal argument to buttress her motion to compel these document requests, namely, that a plaintiff in a Title VII case alleging sex discrimination in denial of her tenure is entitled to the personnel files of all faculty members of defendant college

"because all the faculty members were comparators and because she had a right to inspect the personnel records of the decision-makers in the case." Pl. Mot. Rec. at 35-36 (citing Orbovich v. Macalester College, 119 F.R.D. 411. 415 (D. Minn. 1988)). Accordingly, this court will reconsider its prior determination in light of plaintiff's new argument. See Consolidated Edison Co., 184 F.R.D. at 2.

a. Document Requests # 6 and 21

The scope of discovery permitted in Title VII litigation is broad, and it is well-established that inquiry into an employer's general employment practices is permitted in an individual disparate treatment claim. See, e.g., Scales v. J.C. Bradford and Co., 925 F.2d 901, 906 (6' Cir. 1991); Obiajulu v. City of Rochester, Dept. of Law, 166 F.R.D. 293, 296 (W.D.N.Y. 1996). Discovery in a Title VII case often extends to employee personnel files, which can be critical to establishing pretext and are therefore a permissible part of discovery. See Coughlin v. Lee, 946 F.2d 1152, 1159 (5' Cir. 1991) (citing Trevino v. Celanese Corp., 701 F.2d 387, 405-06 (5th Cir.1983); Burns v. Thiokol Chemical Corp., 483 F.2d 300, 303-07 (5'" Cir. 1973); Weahkee v. Norton, 621 F.2d 1080, 1082 (10th Cir.1980); Rich v. Martin Marietta Corp., 522 F.2d 333, 344-45 (10th Cir.1975); accord Marshall v.Westinghouse Electric Corp., 576 F.2d 588, 592 (5th Cir.1978) (ADEA claim)).

Despite the liberal scope of discovery in the Title VII context, courts routinely impose limits on

the scope of discoverable information that reflect a balance between the needs of both parties. See, e.g. Obiajulu, 166 F.R.D. at 296 (citing Earley v. Champion International Corp, 907 F.2d 1077 (11th Cir. 1990) (limiting Title VII discovery to plaintiffs employment unit); James v. Newspaper Agency Corp., 591 F.2d 579 (10th Cir. 1979) (limiting discovery in gender discrimination suit to plaintiff's department)). In addition to limiting the permissible location of discovery in a Title VII case to the department. unit, or section in which plaintiff and similarly situated persons were employed, see id., courts also impose reasonable time limits on the discovery period. See Obidulu,166 F.R.D. at 296 (imposing discovery period of three years over plaintiff's request for eleven years); Miles v. Boeing Co., 154 F.R.D. 114, 120 (E.D. Pa. 1994) (permitting discovery period of two years from alleged date of discrimination); Raddatz v. The Standard Register, 177 F.R D. 446, 448 (D.Minn. 1997) (restricting time period of discovery to two years prior and subsequent to plaintiffs termination, thereby overruling plaintiffs request for more than ten years).

In addition to considering time and location limits, courts confronted with requests for employee personnel files weigh the relevancy of the information sought, and the privacy concerns at stake, against a plaintiffs need to build its case. Courts are often reluctant to permit the production of the entire contents of an employee's personnel file absent a showing that the personnel records contain information "reasonably calculated to lead to the discovery of evidence admissible at trial." See

Broderick, 117 F.R.D.306, 321 (D.D.C. 1987) (prohibiting in part the disclosure of the personnel records of certain employees because the privacy interests of the individuals and the failure to demonstrate relevance outweighed plaintiffs request); United States EOC v. Ian Schrager, 2000 WL 307470. at *4 (C.D.Ca. March 8, 2000) (quoting Raddatz v. The Standard Register Co., 177 F.R.D. 446. 449 (D.Minn. 1997) ("At a minimum, before a Court compels the production of non-party personnel files, it should be satisfied that the information in those files is, indeed, relevant.") While plaintiff argues that cases like Orbovich stand for the broad proposition that a plaintiff in a Title VII denial of tenure case is entitled to the personnel records of all university professors, many courts, including the very court that decided Orbovich ten years earlier, have criticized the rationale in Orbovich as sanctioning overly intrusive discovery of personnel files. See EEOC v. Ian Schrager at *4; Raddatz, 177 F.R.D. at 447-48. ("In our considered view, the very act of disclosing an employee's sensitive and personal data is a highly and frequently, an unnecessarily intrusive act ..... [T]o order the production of such non-party employee files--even under the restrictions of a Protective Order--is not a step which the Court should lightly undertake.") Therefore, plaintiff's discovery needs with respect to personnel files are to be carefully weighed against the relevance of the request and the privacy concerns raised.

Plaintiff in her motion to compel and for reconsideration seeks the personnel file of Dean Gresham Bullock (Document Request #6), a party to

this lawsuit, on the theory that the information contained in Bullocks' file is relevant to plaintiff's claim of retaliation. See Pl. Mot. Rec. at 35-36, n. 38. Plaintiff's motion for reconsideration as to Request #6 is granted with qualification. Defendant Howard University has already indicated that it will produce Bullock's personnel file, subject to a protective order preventing plaintiff from disclosing the contents of Bullock's file to third parties. Mot. Sec. Prot. Order at 5. Bullock is a party to this lawsuit, and the information contained in her file may bear on the issues of disparate treatment and animus. I will therefore permit plaintiff access to portions of Dean Bullock's file, but only upon conducting an *in camera* review of the file to determine what information, if any, contained in the file is relevant to plaintiffs claims of disparate treatment or discriminatory intent in failure to hire. Moreover, as I discuss in detail in Paragraph 6 of this section, any portion of the file that plaintiff receives will be subject to a protective order.

Plaintiff also seeks the complete personnel files of "all HULS professors, visiting professors, and professors on the tenure track position" for an unspecified period of time (Document Request # 21). The April 11, 2001 Order of this Court permitted plaintiff access to only her own personnel file, and the personnel file of her alleged comparators, Christa Cunningham and Lateef Mtima. Although plaintiff limits her request to that division of the University in which plaintiff was employed, i.e., the Howard Law School, her request broadly seeks the complete personnel files of all professors in that division, and provides no limits on the discoverable time period.

After reviewing the relevant pleadings, and the standards courts use to shape the scope of discovery in a Title VII case, I find that plaintiff may have access to certain personnel files of non-party employees of HULS only upon a showing that information within those files is relevant to plaintiffs claim. To make this showing, plaintiff must reshape her inquiry as to the personnel files, delineating with specificity the types of information that might be relevant to her claim, e.g., documents related to tenure review. publication records, employment contracts, evidence of disciplinary action, etc. By contrast, information related to income, medical history, and personal contact information like addresses and phone numbers can certainly have little or no relevance to the claims in this litigation. See Raddatz, 177 F.R.D. at 447. This Court joins those courts who have criticized the broad discovery of personnel files, and is reluctant to permit plaintiff access to the private, sensitive information that may be contained in those files.

Furthermore, even though any files ultimately provided to plaintiff will be subject to a protective order, plaintiff must nonetheless make a showing of relevance to justify discovery of particular information in those files. See id. at 447-48.

Accordingly, plaintiff's motion for reconsideration as to Document Request Number 21 is denied without prejudice to renew her request upon a showing of relevance as to particular types of information that may be contained in the HULS personnel files plaintiff seeks. In this

renewed request, plaintiff shall also specify the names of those professors, besides Christa Cunningham and Lateef Mtima, who may be comparators of plaintiff, or against whom plaintiff alleges retaliatory conduct. Finally, the Court will limit plaintiff's inquiry into personnel files from a period of time *three* years prior to plaintiff's termination from HULS to the present. This means that plaintiff shall limit her request to the files of those professors employed by HULS three years prior to plaintiff's termination, and three years subsequent to her termination.

b. Document Request # 22

Plaintiff also seeks reconsideration of this Court's ruling on Document Request Number 22. Request Number 22 asks defendant to "... produce the names of all Howard University Law School professors that have been concurrently employed by the Howard University Law School and any other employer from January 1996 to the present (include names of such employers)."

Plaintiff does not offer any argument in her motion for reconsideration or motion to compel as to why the names of all, let alone any, HULS professors concurrently employment by HULS and another employer is relevant to any issue in this case. Plaintiff's citation to Orbovich does not explain how identifying this particular group of professors who were simultaneously employed by HULS and by another employer has any bearing on the claims in this case. Absent this showing, plaintiff's motion to reconsider is denied.

4. Depositions

Plaintiff seeks to have depositions in this case held in abeyance until plaintiff receives the discovery that was ordered by this Court on April 11, as well as additional discovery matters that are the subject of this Order. Pl. Mot. Rec. at 37-38. Plaintiff's request is granted. Plaintiff could not possibly go forward with the depositions dates, now expired, proposed by defendant, i.e., May 21-23, and May 25. given the fact that, as of those dates, defendant had not produced any of the discovery materials that this Court ordered defendant to produce by May 1, 2001.

Defendant should take note that if any of the deponents sought by plaintiff are now unavailable due to defendant's inexcusable delay in complying with this Court's order, defendant may face additional sanctions by this Court.

In a related matter, plaintiff asks this Court to reconsider its determination that plaintiff shall pay witness fees to persons plaintiff seeks to depose. This issue shall be held in abeyance pending the resolution of the discovery matters at issue.

5. Defendant's First Motion for Protective Order

Plaintiff also asks this court to clarify its ruling on Defendant's First Motion for Protective Order, which the Court granted in part and denied in part in the April 11, 2001 Order. Defendant's motion for a protective order sought to preclude plaintiff from deposing fourteen witnesses and to preclude

defendant Howard University from producing the personnel files of Professors Christa Cunningham and Lateef Mtima.

This Court's Order of April 11, 2001, denied defendant's motion as to that portion which sought to preclude plaintiff from producing the personnel files of Professors Christa Cunningham and Lateef Mtima and directed defendant to produce those files to plaintiff by May 1, 2001. Order at 6. However, the Order did not explicitly resolve defendant's motion for a protective order regarding the number of witnesses that plaintiff seeks to depose. The court will resolve this issue now.

Defendant moves for a protective order under Rule 26(c) to prevent plaintiff from deposing fourteen witnesses, arguing that it initially agreed to six depositions, and the testimony of the additional eight witnesses will be cumulative, redundant and "time consuming." Defendant's Motion for a Protective Order ("Def. Mot. Prot.") at 3.

Under Rule 26(c), a party seeking a protective order related to discovery materials must show "good cause" why the relief sought should be granted. Fed. R. Civ. P. 26(c); Lohrenz v. Donnelly, 187 F.R.D. 1, 3 (D.D.C. 1999). In interpreting Rule 26(c), courts weigh a movant's assertion of "good cause" against the opposing party's substantial interest in preparing for trial. See, e.g., Lohrenz, 187 F.R.D. at 3 ("The required showing of good cause under Rule 26(c) must be sufficient to overcome [a party's] legitimate and important interest in trial

preparation."). In this case, defendant Howard University has offered no evidence to support its claim that plaintiff should be precluded from deposing an additional eight witnesses beyond the six it agreed to. Rather, defendant conclusorily states that deposing fourteen witnesses, as opposed to the six that plaintiff initially sought, will be "cumulative. redundant and time consuming." Def. Mot. Prot. at 3. The court finds that defendant's generalized statements, weighed against the need for plaintiff to move forward with discovery in this matter, do not meet the burden established under Rule 26(c). Plaintiff shall therefore be permitted to take the depositions of the fourteen witnesses that she requests.

Accordingly, this Court amends its prior determination of defendant's Motion for Protective Order, which is now denied in its entirety.

6. Defendant's Second Motion for a Protective Order

In its April 11 Order, this Court granted in part and denied in part defendant's Second Motion for a Protective Order. Defendant's motion sought to 1) preclude plaintiff from disclosing the personnel files of Dean Bullock or any other HU personnel file to third parties; 2) preclude depositions from commencing at 5:00 pm; 3) preclude plaintiff from obtaining the personnel files of all law school faculty members; and 4) preclude plaintiff from disclosing to third parties the "confidential, internal University investigative file regarding allegations of inappropriate female gender-specific remarks by Prof. Schuman in 1998." Defendant's Motion for "Second" Protective Order ("Def. Mot. Sec. Prot.") at 1.

The Court's Order granted defendant's motion with respect to preventing depositions from commencing at 5:00 pm and granted in part the motion with respect to precluding plaintiff from obtaining the personnel files of *all* law school faculty members.[4] With regard to the disclosure of personnel or investigative files to third parties, this Court did not explicitly rule on that portion of defendant's motion. It will do so now.

Defendant moves for a protective order as to University personnel files and the investigative file of Professor Shuman that plaintiff seeks access to in the discovery phase of this case. Defendant argues that the personnel files of Howard University faculty are confidential, and plaintiff should be prevented from disclosing the information contained within them to the media and to third parties. Def. Mot. Sec. Prot. at 3-4. Defendant supports its argument for a protective order under Rule 26(c)[5] with deposition statements by the plaintiff indicating plaintiff has discussed this particular lawsuit with third persons via the Internet and talk radio shows. Def. Mot. Sec. Prot. at 4 (citing Ex. 3, Deposition of Martin at 28, in. 20-22; 291n. 1-8; 30 ln. 17-20; 31 ln. 4-6; 33 In.

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[4] The Order directed that, "All depositions will be taken between ordinary business hours, i.e., 9 a.m. to 5 p.m..."). Order of April 11, 2001 at 2. Further, the Court held that plaintiff was only entitled to the personnel files of herself, and those individuals to whom she is being compared, i.e., Professors Cunningham and Mtima. Id. at 6.

[5] See Radditz 177 F.R.D. at 447; Dandal v. Thorn Americas, Inc., 1997 WL 599614, at *1 (D. Kan. Sept. 15, 1997).

4-7). Additionally, Howard cites that portion of plaintiffs deposition testimony which indicates she has verbally communicated with Howard alumni and persons affiliated with Howard regarding this case, and that plaintiff has personally contacted members of the press about her case. Def. Mot. Sec. Prot. at 4-5 (citing Deposition of Martin at 33, 38). Based on plaintiff's past discussions to third parties, defendant seeks a protective order to prevent future disclosures of confidential information contained in employee personnel files, or the internal investigative file related to Professor Shuman.

After reviewing defendant's motion, the related pleadings, and plaintiffs deposition statements regarding her prior discussions of this case with third parties and the media, this Court finds that Defendant has met the "good cause" requirement under Rule 26(c). Defendant's strong interest in protecting this information from disclosure to third parties outweighs any claims plaintiff may make about the necessity of sharing this information with third parties. Moreover, by imposing a protective order on the personnel and investigative files provided to plaintiff, this Court in no way impedes plaintiff's own access to the information contained in those files, nor impairs her ability to prepare for trial. See Lohrenz, 187 F.R.D. at 3. Plaintiff is merely prohibited from divulging the information to third parties. Accordingly, the court will issue a protective order accompanying this Memorandum Order and Opinion which will set forth the conditions of plaintiff's obtaining the personnel files

of any HULS employee, and the investigative file related to Professor Shuman.

In light of the above determination, the Court supplements its prior ruling on defendant's Motion for a "Second" Protective Order, which was granted in part and denied in part.

7. Sanctions

Plaintiff renews her request for sanctions against Howard University. In the Order of April 11, 2001, this Court denied without prejudice both parties' request for sanctions, and indicated parties could renew their motions in the future in light of the April 11, 2001 ruling.[6] Plaintiff's Motion for Reconsideration again seeks sanctions against Defendant.

Plaintiffs renewed request for sanctions is held in abeyance pending further order by this court at the conclusion of discovery.

B. General Discovery Matters

It is this Court's sincere hope that no further delays, or other considerations, will impede the completion of discovery in this matter. The Court will set a discovery deadline in this case shortly, pending resolution of the outstanding discovery materials to be provided to plaintiff.

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[6] As a point of clarification, the Court's Order of April 11, 2001 intended to deny both parties' motions for sanctions *without prejudice*, and any confusion of this point was unintentional.

Defendant should note that all pleadings and correspondence to plaintiff should be directed to the address of her law firm: Law Offices of Dawn V. Martin, Esq., 1090 Vermont Avenue, N.W., Suite 800, Washington, DC 20005. Defendant shall *not* direct any correspondence or pleadings to 442 Freelinghussen Avenue in Newark, New Jersey. Additionally, defendant shall cease filing any nondispositive motions or pleadings without making a good faith effort to contact plaintiff in advance of its filing to determine whether the parties may resolve the issue, or whether plaintiff has any objections to the said filing. A voicemail message will not be deemed a good faith effort to confer with opposing counsel under Local Civil Rule 7.1(m).

Plaintiff should note that in the future, plaintiff's filings in this case shall not exceed fifteen (15) pages. Should plaintiff deem it necessary to file a pleading in excess of fifteen (15) pages, plaintiff must seek leave of court. Further, plaintiff should note that it is unnecessary for plaintiff to repeat the history of this case in every pleading plaintiff files.

CONCLUSION

In accordance with this Memorandum Opinion, it is hereby

ORDERED that Plaintiff's Motion for Reconsideration [#95] is **granted in part** and **denied in part.** It is further hereby

ORDERED that plaintiff's Motion for an Order to Show Cause was Defendant Should Not be Held in Contempt for Violation of Court's Order [#100] is **granted;** it is further hereby **ORDERED** that plaintiffs Motion for Sanctions for Failure to Provide a Proper Answer [#99] is **denied.** The Court determines that insofar as there are inconsistencies between defendant's Answer and the Answer provided by Dean Bullock, the statements of Dean Bullock are deemed admissible and may be used against Howard University. It is further hereby

ORDERED that defendant's Motion by Howard University to Late File Opposition to Plaintiff's Motion for Reconsideration [#102] is **denied.** It is further hereby

ORDERED that the Court amends its prior determination of defendant's Motion for a Protective Order, which is now **denied.** Accordingly, plaintiff is permitted to depose fourteen witnesses. It is further hereby

ORDERED that the Court's prior determination of defendant's Second Motion for a Protective Order is supplemented to subject all HULS personnel files, and the internal HULS investigative file regarding allegations of inappropriate gender-specific remarks by Professor Schuman in 1998, to a Protective Order. The Protective Order related to these materials shall accompany this Memorandum Opinion and Order. It is further hereby

ORDERED that defendant shall show cause within ten (10) days of the date of this order why Howard University and its counsel should not be held in contempt for failure to comply with this Court's order of April 11, 2001 directing defendant to provide plaintiff's with answers to interrogatories and document requests by May 1, 2001, and why defendant University should not be precluded from presenting a defense in this case. Plaintiff shall file her response to defendant's show cause statement ten (10) days thereafter. The Court notes that Howard University and its counsel, Mr. Lattimore, must be represented by separate counsel for the purposes of this show cause statement. It is further hereby

ORDERED that defendant shall submit answers to Interrogatories ## 50, 55, 57 and 59 within ten (10) days of the date of this Order; it is further hereby;

ORDERED that plaintiff shall renew any request related to Document Request # 21

within ten (10) days of the date of this Order. Defendant shall have five (5) days thereafter to file any objections to plaintiff's renewed request. It is further hereby

ORDERED that defendant shall produce the personnel file of Dean Bullock for *in camera* review within ten (10) days of the date of this order; it is further hereby **ORDERED** that all deposition scheduling and witness fees' issues shall be held in abeyance until further order of this court. It is further hereby

ORDERED that plaintiff's renewed request for sanctions is held in abeyance.

SO ORDERED.

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated:05/30/01

204 F.Supp.2d 1, 166 Ed. Law Rep. 127

United States District Court,
District of Columbia.
Dawn MARTIN,
Plaintiff,
v.
HOWARD UNIVERSITY, et al., Defendant.
No. CIV A 99-1175(TFH/JMF).
May 23, 2002.

*1 James William Morrison, Holland & Knight, L.L.P., Dawn Valore Martin, Quin Harry Martin, Washington, DC, for Plaintiff.

James Patrick Schaller, Jackson & Campbell, P.C., Deborah K. St. Lawrence, Phillip A. Lattimore, III, Office of the General Counsel, Frederick Douglas Cooke, Jr., Rubin, Winston, Diercks, Harris & Cooke, L.L.P., Washington, DC, for Defendants.

Daniel I. Prywes, Pepper, Hamilton L.L.P., Washington, DC, for Non Party.

ORDER

FACCIOLA, United States Magistrate Judge.

Once more into the breach. I wonder if the parties and the court will ever wake up from the nightmare discovery has become in this case.

[1] Staring a contempt citation in its face for its failure to comply with my April 11, 2001 order,

Howard University ("Howard") and its counsel ask me to reconsider and correct that order. I hasten to add that in responding to my order to show cause why they should not be held in *2 contempt, neither Howard nor its counsel is arguing that the supposed errors in my April 11, 2001 order vitiate my instruction that they show cause why they should not be held in contempt. To the contrary, they defended themselves by first conceding that they failed to comply with that order. Howard stated the following:

> The University acknowledges, with concern, that it unintentionally failed to comply with certain provisions of this Court's April 11 Order. This defendant apologizes to the Court and to plaintiff for this failure.

Defendant Howard University's Response to Order to Show Cause at 1 (filed June 11, 2001).

Howard's counsel, represented at my direction by his own counsel, stated:

> Mr. Lattimore apologizes for the failure to comply in all respects with the Court's Order of April 11, 2001, which required that discovery response be completed within twenty days.

Response of Phillip A. Lattimore, III to Show-Cause Order at 1 (filed June 11, 2001).

These submissions by Howard and its counsel were therefore devoted to why its counsel's failure

was not contumacious-namely because it was due to the extenuating circumstance of primary counsel's involvement in a trial in the Superior Court. Thus, although the motion for reconsideration now before me was filed the same day as the responses to the order to show cause, neither Howard nor its counsel asserted that my order of April 11, 2001 was in any way erroneous.

Indeed, my order that they show cause why they should not be held in contempt dealt only with the failure of Howard to comply with a deadline I set and had nothing to do with whether it had responded to plaintiff's discovery requests-the premise of its current motion for reconsideration. In my order, I stated the following:

As a preliminary matter, I will first resolve the issue of Howard University's failure to comply with this Court's Order of April 11, 2001. The May 1st discovery deadline set by this Court passed without any indication from defendant that it could not meet this deadline. Defendant did not take any measures to seek relief from the May 1st deadline. Rather, the defendant merely allowed the deadline to lapse without any response whatsoever. Defendant filed no pleadings in this case until May 18, 2001, when it sought leave to file a late response to plaintiff's motion for reconsideration.

Defendant's flagrant disregard for this Court's Order is unacceptable. Accordingly, Howard University shall show cause in writing within ten (10) days of the date of this order why Howard

University and its counsel should not be held in contempt for failure to comply with this Court's order of April 11, 2001, directing defendant to provide plaintiff with answers to her interrogatories and document requests as compelled by the Order, and why defendant University should not be precluded from presenting a defense in this case altogether.

Memorandum Opinion and Order at 4.

[2] Since my show cause order dealt only with the failure of Howard and its counsel to meet the deadline I set, any alleged mistakes in my April 11, 2001 order are of academic interest. First, even a "mistaken" order commands obedience until it is overturned on appeal. *Maness v. Meyers*, 419 U.S. 449, 458, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975). Second, Howard could have brought my supposed mistakes to my attention after I issued the April 11, 2001 order and before the May 1, 2001 deadline had past. Instead, Howard chose **3* to ignore the May 1, 2001 deadline and instead moved me to reconsider my April 11, 2001 order after being directed to show cause why it and its counsel should not be held in contempt. Thus, as Howard would have it, a party can ignore alleged mistakes in a court order, let deadlines come and go, and then, only after being ordered to show cause why it should not be held in contempt, inform the court of the court's supposed errors. It is hard to imagine a process that more trivializes the obligation a litigant has to comply with a court's orders.

Finally, Howard's complaint is that it had been ordered to provide information that it has already provided. First, assuming that is true, how has it been harmed? Second, there is no authority that would permit the filing of this motion for reconsideration. Howard cites Fed.R.Civ.P. 60(b) but forgets that the rule applies only to setting aside a final judgment. My April 11, 2001 order was no such thing. It merely resolved discovery issues. Indeed, in this case, to use the word "final" is to tempt fate.

Howard also relies on the court's inherent authority to consider such a motion. However, one would have to first posit the existence of such an authority. In practice, such an authority does not exist in isolation but has to be read in consonance with the Federal Rules of Civil Procedure and the court's obligation to conduct business in an orderly fashion.

In the case at bar, it must be recalled that in plaintiff's motion to compel, plaintiff specifically identified by number each discovery request that she claimed Howard had failed to sufficiently answer. In response to plaintiff's motion to compel, instead of providing a detailed explanation with attachments of how it had already responded to those discovery requests, Howard merely stated that "[t]he University adequately responded to all other discovery requests." *Opposition to Plaintiff's Motion to Compel and for Sanctions* at 7.

That limp generalization was no help at all. As a result, as has happened again and again in this

case, my clerk and I had to go through pleading after pleading and every discovery request and response to find out what was requested and what was provided. We charted what we found and it was that chart and our independent analysis of the discovery that were the basis of conclusions in my April 11, 2002 order. Thus, Howard never specifically indicated why it believed it had answered the discovery "adequately" as it put it. The court, by itself, had to ascertain what in fact Howard provided in discovery.

[3] When one reconstructs what really happened, it is clear that Howard, no matter how it styles its motion, is not asking me to reconsider anything. To "reconsider" means to consider for a second time a matter or argument that one previously considered. That is not what Howard is requesting. What Howard is really indicating to the court is that it failed to make a specific showing of why its responses were adequate and then asked me to consider, for the first time, if its responses to plaintiff's discovery requests were adequate after I had ruled. To style that request as a "motion to reconsider" is nonsensical. As courts have often stated, a motion to reconsider cannot be used to advance arguments not made in the first instance, prior to the court's ruling. *Novato Fire Protection Dist. v. United States*, 181 F.3d 1135, 1142 n. 6 (9th Cir.1999); *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993); *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir.1996); *Noon v. Sailor*, 2000 WL 684219 * 1 (S.D.Ind.2000).

It is therefore, hereby,

*4 **ORDERED** that the *Motion by Howard University for this Court to Reconsider and Correct its April 11, 2001 Discovery Order* [# 113] is **DENIED**.

SO ORDERED.

D.D.C., 2002. Martin v. Howard University 204 F.Supp.2d 1, 166 Ed. Law Rep. 127.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN
Plaintiff,
v.
HOWARD UNIVERSITY,
Defendant.

Civ. No. 99-1175
TFH/JMF
June 27, 2002

MEMORIALIZING ORDER

In accordance with the Court's June 26, 2002 bench ruling and based upon the findings certified by Magistrate Judge Facciola and the findings of the Court at the June 26, 2002 show cause hearing it is hereby

ORDERED that defendant Howard University is found in Civil Contempt for, without excuse, having failed to timely respond to the Court's April 11, 2001 Order. As a result, defendant Howard University shall be sanctioned as follows:

(1) Defendant shall pay to plaintiff $1,000 (one thousand dollars);

(2) Defendant shall produce for deposition without cost Officer James Dowdy. Further, Officer Dowdy shall produce all notes relating to his work with the defendant and plaintiff;

(3) If deemed necessary by the plaintiff, defendant shall again produce for deposition Associate Dean

Newsom who will bring requested documents including the May 26, 1998 Memorandum from the Dean to plaintiff;

(4) Defendant shall make another review of its records and review plaintiff's chart #3 submitted at the June 26. 2002 hearing and shall have a Howard University official certify under oath that the documents listed in chart #3 are missing or do not exist. This shall be filed no later than July 19. 2002. Further, upon defendant's failure to adequately explain missing documents, plaintiff may seek additional relief from the Court which may include

(5) allowing certain documents into evidence or preclusion of certain defenses.

It is further hereby

ORDERED that plaintiffs request for default judgment is DENIED; and, it is further hereby

ORDERED that the Court will hold a Status Conference in this case on July 25, 2002 at 11:00 a.m.

So ORDERED.

June 27, 2002

Thomas F. Hogan /s/
Chief Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN
Plaintiff,

v.

HOWARD UNIVERSITY,
Defendant.

Civ. No. 99-1175
TFH/JMF
September 24, 2002

ORDER

During his deposition on September 6, 2002, Professor Andrew Taslitz testified that he relied in part on statements made by Professor Andrew Gavil that plaintiff showed "bad judgment" in the manner in which she dealt with a first-year student. Taslitz also said that what Gavil told him played some part in his decision not to select plaintiff for a permanent position at the Howard University Law School.

At some point, it appears that Gavil reported a complaint this student had made about plaintiff to Assistant Dean Denise Purdie Spriggs. When informed of the complaint, plaintiff then memorialized her contact with the complaining student in a memorandum to Dean Spriggs.
As the close of discovery approached, I attempted to broker a compromise between plaintiff, who had noticed Dean Spriggs's deposition, and Howard, that refused to produce her. When that attempt

failed, Howard moved for a protective order. In the meanwhile, the deadline for discovery had passed and the reason Dean Spriggs gave for being inconvenienced by the taking of her deposition is no longer pertinent.[7] Thus, the question presented now is whether plaintiff should be prohibited from taking this deposition. I think not.

I am familiar with this case and I have no reason to disbelieve plaintiffs insistence that she learned only recently that Howard might be relying on her supposed "bad judgment." If so, and the deposition of Dean Spriggs is conducted in no more than a single day, I cannot possibly say that, on balance, taking it is oppressive or unreasonable. Plaintiff has the right to pursue the facts underlying any justification Howard may offer to rebut her claim that her not receiving a permanent position was the product of sexual discrimination and retaliation for complaining about it. That a plaintiff can pursue discovery of the justification offered by the defendant for the employment decision it made is, by now, a fundamental principle of equal employment opportunity law.

I am also aware, however, that the deadlines for dispositive motions, their resolution prior to trial, and the trial itself are fast upon us. I believe that the parties must give them priority. Therefore, we shall proceed as follows. Within 3 days of this Order,

---

[7] The Dean had to attend the mediation training offered by the Superior Court.

Howard University will file with the court a statement unequivocally stating whether it intends to rely on the incident with the student, characterizing it as a display of bad judgment and tendering it as justification for Howard's not offering plaintiff a permanent position. If it says that it will not, there the matter will end and Howard will be absolutely precluded from relying, in any way, on the incident as justification for not offering the plaintiff a permanent position. If, on the other hand, Howard does not file that statement, its failure to do so will be deemed an intention to assert plaintiffs behavior with reference to this student as a defense and plaintiff may take Dean Spriggs' deposition, even though the discovery period has ended. But, because the deadline for dispositive motions is fast upon us, I will preclude Howard from relying on the incident with the student, and the supposed bad judgment plaintiff displayed during it, in its motion for summary judgment. In this way, the briefing of the motion can go forward without having to await the conclusion of Dean Spriggs' deposition.

SO ORDERED.

John M. Facciola

Magistrate Judge September 24, 2002

United States District Court,
District of Columbia.
Dawn v. MARTIN, Plaintiff,
v.
HOWARD UNIVERSITY, et al., Defendant.
No. CIV.A.99-1175 TFH/JM.
Oct. 20, 2003.

James William Morrison, Holland & Knight, L.L.P., Washington, DC, Dawn Valore Martin, Quin Harry Martin, Washington, DC, for Plaintiff.

Leroy T. Jenkins, Jr., Howard University, Office of Legal Affairs, Washington, DC, Brian Lawrence Schwalb, Schwalb, Donnenfeld & Schwalb, P.C., Washington, DC, Nadine Chandler Wilburn, Office of Corporation Counsel, D.C., Washington, DC, James Patrick Schaller, Jackson & Campbell, P.C., Washington, DC, Deborah K. St. Lawrence, Howard University, Washington, DC, William ChappeleEugene Robinson, Phillip A. Lattimore, III, Washington, DC, Frederick Douglas Cooke, Jr., Rubin, Winston, Diercks, Harris & Cooke, L.L.P., Washington, DC, for Defendant.

REPORT AND RECOMMENDATION
FACCIOLA, Magistrate J.

*1 For the reasons stated in this opinion, I recommend that the parties' cross motions for summary judgment be denied except that Howard University's motion be granted as to plaintiff's claims based on Howard's leaving certain faculty positions vacant and hiring a tax professor.

BACKGROUND

The plaintiff, Dawn V. Martin ("Martin"), was a visiting professor at Howard University Law School [FN1] from August 16, 1996 until her contract expired on May 15, 1998.

FN1. Hereafter "HU".

This lawsuit grows out of incidents involving a mentally deranged homeless man, Leonard Harrison ("Harrison"), whose strange behavior led plaintiff to seek protection from HU. Subsequently, however, plaintiff complains that HU created a hostile working environment because of its inadequate reaction to Harrison's behavior. She also complains that HU retaliated against her because of her complaints to the administration about its inadequate response.

INTRODUCTION

I. *The Parties' Failure to Comply with the Local Rules*

The parties have cross-moved for summary judgment. This obliged each of them to comply with our local rules by filing a *Statement of Material Facts as to Which There Is No Genuine Issue.* LCvR 7.1(h). Once they received each other's *Statement,* they were obliged to file an opposition that "shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated." *Id.* The statement of genuine issues must refer to that portion of the

record, created by discovery and otherwise, that supports the contention that a certain fact is disputed. *Id.* Neither party complied with the rule. Plaintiff filed *Plaintiff's Statement of Material Undisputed Facts* ("Plains.Statement"), but HU filed what it called *Howard University's (Corrected) Statement of Material Facts that Preclude Summary Judgment for Plaintiff.* HU said that it filed this document "to support its opposition to plaintiff's motion for summary judgment" and then in a footnote stated:

> HU asserts that this statement precludes this Court from entering summary judgment for plaintiff. Indeed, to the extent these facts are undisputed by plaintiff, as set forth in HU's motion for summary judgment, this Court must grant summary judgment for HU. Moreover, the existence of these factual issues precludes the entry of summary judgment for plaintiff.

Id. at 1 n. 1.

HU's assertion that material facts preclude summary judgment for plaintiff has to mean that plaintiff is not entitled to summary judgment because there are factual issues that have to be resolved by a jury. But, if there are factual issues that have to be resolved by a jury, that means that HU is not entitled to summary judgment either since the existence of any factual issues precludes granting summary judgment for HU as much as it precludes it for plaintiff.

Unfortunately, plaintiff, apparently forgetting that she was both movant and opponent of a motion, also failed to comply with the rule and file a statement of facts as to which there is a genuine issue. The parties' failure to comply with the local rule puts me in the impossible predicament of attempting to resolve cross-motions for summary judgment without knowing exactly what facts are disputed. Confronted with two irreconcilable versions of the facts, I certainly cannot prefer one to the other.

***2** I could, at this point, say a plague on both your houses and strike both motions for failure to comply with the local rule. But, given the tortured, acrimonious history of this case, I am, to put it mildly, reluctant to engender another round of briefing or an appellate issue on what might be characterized as a technical ruling. Moreover, I have presided over this case so long that I can divine what is and what is not in dispute for the limited purposes of my responsibility. As will become obvious, I am firmly convinced that there are genuine issues of material fact as to nearly every issue dividing the parties. Given that conclusion, striking the cross motions would only prolong the agony that this case has become for the parties and the court.

II. *Issues Resolved by Chief Judge Hogan Will Not Be Revisited*

Before turning to my analysis, I must note that in 1999, Chief Judge Hogan denied HU's motion for summary judgment and specifically held that there

were factual issues that precluded an award of summary judgment. *Martin v. Howard Univ.*, 1999 U.S. Dist. LEXIS 19516 (D.D.C. Dec. 16, 1999). As hard as it is to believe, in its current motion, HU ignores that decision and once again advances the very arguments Judge Hogan rejected. It is, of course, legitimate for a party to renew a motion for summary judgment based on information newly garnered as a result of the discovery process. *See* *Williamsburg Wax Museum, Inc. v. Historical Figures, Inc.*, 810 F.2d 243, 250 (D.C.Cir.1987). But, what HU cannot do is ignore the Chief Judge's decision and expect me to ignore it as well. I cannot reconsider a decision I did not issue, nor do I have any power to overrule the Chief Judge. Thus, his determinations control.

More specifically, the Chief Judge concluded:

1. The alleged harassment by Harrison of the plaintiff was based on her sex;

2. Whether Harrison's conduct was sufficiently severe or pervasive to be actionable under the rubric of a hostile environment claim was a jury question;

3. Whether plaintiff's letter was sufficiently detailed to place HU's Dean Alice Gresham Bullock ("Bullock") on notice that plaintiff believed that she had been the victim of a hostile work environment was a question of fact for the jury;

4. Whether plaintiff engaged in protected activity when she informed Bullock of Harrison's activities

and complained about what she felt was the inadequacy of campus security was a question of fact for the jury;

5. There was a sufficient causal connection between the adverse actions about which plaintiff complained and her complaints about Harrison and campus security to make the issue of whether the former were retaliation for the latter a triable issue of material fact; and

6. Whether one of plaintiff's complaints of retaliatory action, that, as a result of HU's retaliation, she was evicted from her officer prematurely, constituted an adverse employment action was a material issue of fact for the jury.

***3** I will not permit HU, in its second motion for summary judgment, to re-litigate those issues that were resolved against it. Triable issues of fact in 1999 remain triable issues of fact in 2003.

III. *The Issues Raised by HU's Second Motion That May Be Considered*

Reading HU's second motion with some indulgence, there are only three issues that it did not press in its first motion: 1) whether plaintiff suffered an adverse personnel action, *i.e.*, a materially adverse consequence affecting the terms, conditions, or privileges of employment because of Harrison's activities; 2) whether HU's response to plaintiff's complaints about Harrison was adequate; [FN2] and 3) whether information disclosed during discovery compels the conclusion that Howard did

not retaliate against plaintiff such that no reasonable juror could conclude to the contrary.

FN2. HU specifically indicated in its first motion that "material facts regarding the appropriateness of the University's response are indeed in dispute." *Defendant Howard University, Howard University School of Law, President H. Patrick Swygert, and Dean Alice Bullock's (in her Official Capacity) Reply Memorandum of Points and Authorities in Support of their Motion to Dismiss the Complaint or in the Alternative for Summary Judgment* at 4. It, therefore, was not moving for summary judgment on the ground that HU's response to plaintiff's complaints about Harrison was appropriate. Hence, HU can make that argument now.

DISCUSSION

I. *Plaintiff Need Not Show an Adverse Employment Action*

As to the first issue, whether plaintiff must show that she suffered an adverse employment action, HU muddles two distinct bodies of law. When a person claims to be victimized by discrimination and invokes Title VII, she must establish that she was subjected to an adverse employment action, such as a demotion or a loss of pay. *Brown v. Brody*, 199 F.3d 446, 457 (D.C.Cir.1999). On the other hand, when a person complains of being subjected to a hostile environment because of sexual harassment, she is not obliged to show an adverse employment action so long as she establishes that the harassment is sufficiently severe or pervasive to

alter the conditions of her employment, even though she remains employed at the same salary and in the same position. *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Plaintiff was, therefore, not obliged to show that she was fired or demoted as a condition of establishing a hostile working environment. If she did, the protections afforded employees who have to work in hostile environments would evaporate as long as their employers, while tolerating the harassment, did not fire or demote them. What HU is really saying is that only two personal encounters with Harrison do not constitute a hostile environment. But, Chief Judge Hogan has already ruled that whether Harrison's actions did or did not constitute a hostile environment is a triable issue of fact. *Martin,* 1999 U.S. Dist. LEXIS 19516 *8.

II. *The Adequacy of HU's Response*

As to the second issue, the adequacy of HU's response to Harrison's activities, there is a self-evident jury issue presented. Juries exist, after all, to apply a standard, as defined by the court's instructions, to the evidence it hears. There is not much dispute as to what Harrison did, what complaints plaintiff made, and what HU did in response. It is also undisputed that, when Harrison returned to the campus, he was not apprehended. Hence, the adequacy of HU's actions raises a jury question in the same sense as a doctor's treatment of a patient may or may not be deemed negligent under the applicable standard of care. HU's assertion that its response was adequate does not make the issue any less a jury question. The

demand by plaintiff for summary judgment on the grounds that HU's response was inadequate has to be denied for the same reason.

*4 Moreover, if HU were to argue that no reasonable person could conclude that its response was inadequate, plaintiff could point, for example, to the fact that, despite her complaints, the administration failed to alert all of its officers about Harrison's bizarre contacts with the plaintiff. Indeed, when Officer Dowdy encountered Harrison on campus, he simply examined his identification and let him go. This occurred even though campus security and the Metropolitan Police Department had agreed that Harrison should be arrested if he ever came back on campus. Those facts alone create a genuine issue of material fact as to the adequacy of HU's response to plaintiff's complaints. On the other hand, that plaintiff admittedly secured the assistance of the HU security staff nullifies her right to claim that a reasonable person would have to find HU's response inadequate. On either side of the coin, the adequacy of HU's response to plaintiff's complaints is a pristine example of a triable issue of fact.

III. *Understanding Plaintiff's Retaliation Claims*

A. *Chronology of Events*

Plaintiff claims that three additional acts of retaliation occurred after HU decided not to renew her contract. To understand HU's argument as to these claims, one has to understand the sequence of events in this case.

Plaintiff's visiting professorship was scheduled to end with the 1997-1998 school year. *Howard University's Motion for Summary Judgment* ("Defs.Mot.") at 6. On October 1, 1997, Martin formally applied for a tenure-track position, or in the alternative, for a renewed visitorship. Plains. Statement at 20. Martin followed up with a memorandum to the HU's Appointments, Promotions and Tenure Committee ("APT"), dated October 2, 1997, requesting consideration for appointment to a permanent, tenure-track position. Defs. Mot. at 13-14. In the meantime, Howard advertised three available faculty positions for the 1998-1999 academic year: 1) Labor/Equal Employment Opportunity ("Labor/EEO") Law, 2) Constitutional/Civil Rights Law ("Constitutional Law"), and 3) Commercial Law. Plains. Statement at 20.

On Oct. 31, 1997, Martin interviewed with Bullock. Defs. Mot. at 14. Bullock told Martin that her appointment as Visiting Associate Professor of Law would terminate on May 15, 1998 and that Martin was being rejected for reappointment. *Id.* On November 3, 1997, Bullock wrote Martin a letter memorializing the meeting. *First Amended Complaint* ("Plains. Amended Compl.") at Ex. L.

On November 5, 1997, Martin submitted a memorandum to the APT Chair, Isaiah Leggett ("Leggett') to "assist [the APT] in assessing [Martin's] application for a permanent faculty position, or in the alternative, an extension of [her]

visitorship." Defs. Mot. at Ex. 13. On November 7, 1997, Martin interviewed with the APT Committee. *Id.* at 15. On December 18, 1997, the APT Committee met to discuss all open positions. *Id.* After reviewing Martin's application and her supporting materials, the APT decided against recommending Martin for reappointment. *Id.* That same day, Professor Andrew Taslitz ("Taslitz"), Vice-Chair of the APT, verbally informed Martin of the Committee's decision. *Id.*

*5 Shortly thereafter, the APT extended offers to E. Christi Cunningham ("Cunningham"), Reginald Robinson ("Robinson"), and Lateef Mtima ("Mtima"), for the Labor/EEO position, the Constitutional Law position, and the Commercial Law position, respectively. *Id.* at 15-16. In February 1998, Robinson rescinded his original acceptance. Defs. Mot. at 16-17. When Martin became aware of Robinson's recision, she immediately wrote to Bullock. In a letter dated March 6, 1998, Martin requested that HU reconsider the APT's initial December 18 decision to reject her as a candidate for a tenured professorship. In the same letter, Martin also asked that she be considered for the newly vacant Constitutional/Civil Rights position. Plains. Amended Compl. at Ex. Q.

At some point thereafter, tenured HU Tax Law Professor Loretta Argrett ("Argrett") decided to extend her sabbatical leave for another semester. Argrett told Howard she would not return until the Spring semester of 1999, at the earliest. Plains. Statement at 50.

In the Spring of 1998, Bullock determined that she was unable to teach her courses in Tax and Trusts & Estates because of her responsibilities as Dean. Defs. Mot. at Ex. 6. She also realized that Associate Dean Michael Newsom ("Newsom") would not be able to continue teaching Property Law and Trusts & Estates. *Id.* In addition, at some point in time, HU suspended one of its Property Law professors. *Id.*

On April 15, 1998, the APT recommended to Bullock that HU hire Angela Vallario ("Vallario") to teach a Tax course and a Wills, Trusts & Estates course. Defs. Mot. at 19.

On April 8, 1998, Bullock responded to Martin's March 6 letter. Plains. Amended Comp. at Ex. R. Focusing on Martin's request for reconsideration of the December 18 APT decision, Bullock told Martin that HU would not reconsider her application and that the only courses "for which the school has urgent teaching needs ... do not include courses which you teach." *Id.* Additionally, Bullock described how the events that occurred in February 1998 had resulted in changes in HU's hiring needs. *Id.*

In response to Bullock's April 8, 1998 letter, Martin wrote back, asking that she be considered for *any* position at Howard. Plains. Amended Comp. at Ex. S. On April 10, 1998, Martin again wrote to Bullock, this time proposing a number of scenarios in which, she thought, HU could reshuffle the

faculty assignments in order to accommodate her desire for a position. *Id.* at Ex. T.

Bullock replied to Martin's April 10, 1998 letter and, in rejecting Martin's proposed reassignments, stated that "[t]he School of Law executed contracts with new hires several months ago which confirm their teaching assignments. I have no basis to rescind those agreements." Plains. Amended Comp. at Ex. U. Bullock then forwarded Martin's letters to the APT for formal reconsideration. *Id.* Positive action was not taken by the APT, and Martin left HU as the school year ended. Defs. Mot. at 19.

B. *HU's Denial of Martin's Initial Application for Tenure or Renewed Visitorship*

***6** The first act of retaliation alleged by plaintiff is the easiest to articulate and understand: HU's denial of her initial application for tenure or renewed visitorship. This claim is predicated on the December 18, 1997 decision by the ATP not to recommend her re-appointment. The result was that plaintiff lost her job and it was given to Cunningham.

According to Martin, following her complaints regarding Harrison, Bullock expressed "animosity" toward Martin personally and displayed a "sarcastic, callous and hostile response to the issue" generally. Plains. Mot. at 16. Martin also contends that Bullock grew more and more weary of having to deal with Martin's situation and that Bullock's discomfort was made known to the members of the APT. According to Taslitz, Bullock spoke to him

about Martin prior to the APT's December 18, 1997 decision on Martin's application. Deposition of Andrew Taslitz ("Taslitz Dep.") at 130:2-132:11. Taslitz recalled that Bullock raised concerns about Martin's judgment and questioned Martin's abilities as an academic. *Id.* Martin thus claims that the APT evaluation process was "poisoned" since Bullock "used" Taslitz to misrepresent Martin at the APT evaluation. Plains. Mot. at 17-18.[FN3] Martin also claims that the APT was simply a "rubber stamp" for Bullock's recommendation. *Id* .

FN3. Taslitz admits that he spoke with Bullock about Martin prior to the APT Committee meeting to review Martin's application for tenure. Taslitz Dep. at 130:2-131:8. He also admits that she expressed her displeasure with Martin as a law professor and made specific mention of Martin's "poor judgment" to him. *Id.* at 131:9-22. When the APT Committee met to discuss Martin's application for tenure, Taslitz presented a number of "concerns" to the other Committee members regarding Martin. *Id.* at 136:11-140:15. Taslitz also recalled that two other Committee members may have expressed comments about Martin's "bad judgment" when the APT discussed her qualifications. Taslitz confirmed that the comments were tied in some way to Bullock. *Id.* at 168:14-169:12. Taslitz testified that "there were a number of people on the faculty who had been saying that they thought you had poor judgment and that the Dean had also expressed that view very early on in your time at Howard." *Id.*

HU contends that Martin was not recommended for the EEO tenure position because she: 1) lacked

scholarship, 2) exhibited poor judgment, and 3) was not "actively involved in the intellectual life of the Law School community." *Id.* at 38-39.

1. *Martin's Lack of Scholarship*

In support of its claim that Martin lacked scholarship, HU argues that Martin failed to complete and misrepresented her expected ability to complete an article that she was preparing for publication. According to HU, during her initial job interview with the APT in early 1996, Martin represented to the Committee that she had an article in "final form" and "immediately ready for publication." Def.'s Mot. at 6. HU also claims that Martin indicated that she expected to have the article, entitled *911: How Will Police and Fire Departments Respond to Public Safety Needs and Comply with the Americans with Disabilities Act?* ("*911*"),[FN4] finished by the beginning of the 1996-97 school year.[FN5] In her letter to the APT supporting her application for tenure, however, Martin outrightly expressed her self-dissatisfaction with the progress of *911*. HU claims that she even stated that she was "extremely embarrassed at how long [the article] has taken to be ready to send out."[FN6] Defs. Mot. at Ex. 13, p. 4. HU further claims that, in the same letter, Martin promised that the *911* article would be finished the very next day and that her other research project (*Lights, Camera, Discrimination! Playing the Victim Under Title VII* ("*Lights*")) would be done by January 1998. *Id.*

FN4. Taslitz testified that Martin explicitly represented that the "*911* piece at the time [Martin]

had accepted the offer to Howard would be published or at a minimum accepted for publication by the time [Martin] started employment at Howard and, in fact, it was not accepted for publication ...." Taslitz Dep. at 137:19-138:1.

FN5. In her November 5, 1997 letter to the APT in support of her application for tenure, Martin wrote that she "would have liked to have had *911* published at least a year ago." Defs. Mot. at Ex. 13, p. 5.

FN6. Martin cited eleven reasons why the article was not finished. Among those reasons were a car accident in October of 1996, which caused Martin constant headaches and damage to her back and neck, pneumonia suffered over the winter school break of 1996-97, a diagnosis of a severe mold allergy and exposure to "visible" mold-infested classrooms, an IRS problem, difficulties with research assistants, ongoing litigation with her landlord due to "hidden defects," and computer problems that forced Martin to retype the entire article. *Id.*

2. *Martin's Poor Judgment*

***7** In addition to lacking scholarship, Martin, according to HU, also exhibited poor judgment. According to Taslitz, Martin behaved inappropriately at a faculty meeting by refusing to let drop an issue that the faculty had debated and voted on. Despite the fact that the faculty ultimately voted in a way not favored by Martin, according to Taslitz, Martin remained "very insistent" as to the correctness of her viewpoint. Taslitz Dep. at 170:10-17. In addition, Taslitz stated that several faculty

members came away with the impression that "anyone who disagreed with [Martin] was unreasonable" and that "some people were feeling insulted by that." *Id.* Taslitz also stated that other faculty members had told him they didn't believe Martin had good judgment. Taslitz Dep. at 243:12-21.

According to Professor Andrew Gavil ("Gavil"), also an APT member involved in Martin's evaluation, Martin once referred to one of her students with whom she was having a conflict as a "bitch." Deposition of Professor Andrew Gavil ("Gavil Dep.") at 88:7-21. Gavil further stated that the comment was "troublesome" to him since he "was not accustomed to hearing faculty talk about a student that way." *Id.* Gavil recounted the matter to Taslitz and expressed his feeling that Martin's actions showed "very bad judgment." Taslitz Dep. at 247:20-248:21.

3. *Martin's Interaction with the Law School Community*

Finally, HU claims that Martin was not "actively involved in the intellectual life of the Law School community." *Id.* at 38-39. Various faculty members complained to Taslitz that they "found [Martin] difficult to deal with on a personal basis." Taslitz Dep. at 240:2-5, 243:12-21. Newsom told Taslitz that Martin had created "headaches" for his office. *Id.* Taslitz also reported that faculty members "were disturbed [and] felt uncomfortable with [Martin]." *Id.* at 26:3-19. According to Taslitz, Gavil had indicated his "frustration" with the lack of progress

in Martin's scholarship and had noted that there were a "significant number of people who [felt] they [were] having difficulties relating to [Martin]." Taslitz Dep. at 247:20-248:21. Taslitz also stated that Gavil was concerned that Martin had not gone to luncheons to talk about articles and scholarship. *Id.*

Martin agues that HU's proferred reasons are pretextual. The first suggestion of pretext is rooted in the Committee's consideration of applicant publications. Taslitz testified that when the APT met on December 18, 1997 to discuss and consider several candidates for open tenured positions at the Law School, the University considered only articles that were in print by the date of the APT action. According to Taslitz, this was in accordance with the requirements for an Associate Professorship. Taslitz Dep. at 119:20-120:16. Taslitz admitted, however, that while a two-article minimum was the "standard," it was not the "rule." *Id.* Nevertheless, although the publication of two articles was cited as a "minimum standard" for an Associate Professorship, HU offered it as the primary reason for its refusal to offer Martin tenure. *See, e.g.*, Defs. Mot. at 6. Leggett, for example, testified that Cunningham's scholarship production was a "crucial point of the decision" to choose her over Martin. Deposition of Isaiah Leggett ("Leggett Dep.") at 169:4-14.

*8 In Howard's Answers to Interrogatories dated October 17, 2000, Howard stated that Martin was refused tenure in part because as of December 18,

1997 Martin had "no scholarship articles accepted for publication." Plains. Mot. at 25. In fact, HU was aware that Martin's *911* article had been accepted for publication on December 17, 1997, that she had substantially completed work on a second article (*Lights*), and that she was in the process of researching a third. Taslitz Dep. at 159:12-162:13. Significantly, four of the five APT Committee members testified that they knew of the article's publication. Plains. Statement of Facts at 27. Taslitz even testified that he had informed the other members that Martin's article was recently accepted for publication. Taslitz Dep. at 141:7-16.

Leggett testified that not only was he made aware that the *911* article had been approved by the time of the December 18 meeting, but that he was even considering giving Martin credit for two different articles. Leggett Dep. at 117:15-121:8. Nevertheless, when asked why he chose Cunningham, Leggett testified that Cunningham had not only published during her time at Howard but had also presented "sufficient information" to suggest that she would publish again and was in the process of doing so. *Id.* at 160:6-19. Although Leggett testified that publication was a "crucial" factor in his decision, he admitted to not even having read Cunningham's article. *Id.* at 170:19-20.

The second suggestion of pretext is rooted in the reason offered by the Committee in support of its decision to hire Cunningham for the Labor/EEO position. According to Taslitz, Cunningham had extremely positive academic and professional

experience. Taslitz Dep. at 133:21-136:10. However, Leggett testified that Martin had more professional experience in EEO law than Cunningham. Leggett Dep. at 153:2-4. Although Leggett deemed Cunningham's qualitative experience to be better than Martin's, the Committee did not identify qualitative legal experience as a factor for consideration. *Id.* at 200:19-202:3. Finally, Professor J. Clay Smith, another Committee member, testified that Martin's and Cunningham's qualifications were "very close." Plains. Mot. at 32.

The third suggestion of pretext is rooted in the Committee's assessment of Martin's judgment. Leggett testified, contrary to Taslitz' assertion, that he found Cunningham and Martin "basically both qualified ... judgment-wise." Leggett Dep. at 194:22-195:3. Leggett also testified inconsistently with Taslitz on the issue of faculty comments about Martin. Leggett received comments from faculty members about Martin that were not negative. In fact, according to Leggett, faculty members generally had "good things [to say] about [Martin's] ... work," Leggett Dep. at 249:7-12, and there was "no faculty concern brought to [Leggett's] attention regarding Martin's appointment." *Id.* at 251:13-15. Leggett himself admitted that he found Martin "to be collegial" based on his personal contact with her. *Id.* at 258:20-259:7. Although Taslitz considered the impressions of other faculty members important in assessing Martin's "contribution to the life of the Law School community," Taslitz Dep. at 240:2-5, Leggett testified that he personally "did not give a great deal of weight" to positive faculty comments

about Martin and that there "was not a serious discussion among the faculty members" from which to base dispositive judgment on either Martin or Cunningham. Leggett Dep. at 265:11-19

*9 Reading the record in a light most favorable to plaintiff, the articulated reasons for firing Martin are contradicted by the potential testimony of members of the ATP committee who have voiced positive views of Martin. First, contrary to HU's contention that Martin lacked scholarship, there is evidence that members of the APT Committee were in fact aware that one of Martin's articles had been accepted for publication and that she was working on two others. In addition, while Cunningham's scholarship production was cited as pivotal in her selection, one Committee member admitted to not even having read the article. Second, contrary to HU's contention that Martin displayed poor judgment, there is evidence that certain faculty members had positive impressions of Martin and that both she and Gunningham were viewed as equally qualified in terms of their exercise of judgment. Finally, that Martin's professional experience in EEO law was greater than Cunningham's undercuts the argument that Cunningham was substantially more qualified than Martin. In fact, it appears that the decision was a close call.

Allowing for the reality that the selection process is not a scientific one and for the deference that must be paid to the right of an employer, particularly a university, to hire whomever it sees

fit, these inconsistencies compel me to conclude that a reasonable finder of fact could find them untrue and a pretext for retaliation.

C. *HU's Hiring of a Tax, Trusts and Estates Professor*

The second act of retaliation alleged by Martin is that Bullock inappropriately converted a vacant Constitutional Law/Civil Rights position into a Visiting Tax, Trust and Estates position and offered it to Vallario in retaliation against plaintiff for her complaining about Harrison. *Id.* ¶ 312. Plaintiff insists that Bullock only did this to ensure that plaintiff did not return to HU because she was not qualified to teach a tax course, even though she was qualified to teach a constitutional law course.

HU claims that the Law School's faculty needs for the 1998-1999 academic year simply "changed" around the Spring of 1998. First, HU cites Argrett's decision to extend her sabbatical leave for another semester. Second, HU cites Bullock's and Newsom's decisions to give up their teaching responsibilities. According to HU, these changes created the following vacancies: Tax (3 sections), Trusts and Estates (2 sections), and Property (4 sections). Bullock went to the APT to begin the hiring process anew, and as a result, the APT hired Vallario.

Martin counters that HU simply reshuffled the deck. Martin argues that when she reapplied for the Constitutional Law position, Bullock simply did not want to deal with her anymore. Therefore, instead of vetting Martin through the APT again for a

different position, Bullock decided to rearrange her and her colleague's schedule and to create a position for which there was previously no need.

D. *HU's Decision to Leave Certain Positions Vacant*

***10** The third act of retaliation identified by Martin is that HU, in retaliation for her complaints about Harrison, left certain positions open rather than consider her for any of them. *Id.* ¶¶ 326, 327, 330, 340, 345. According to Martin, HU failed to fill several vacancies that were created at various times during the first few months of 1998. Specifically, Martin claims that HU failed to fill the following positions: 1) the Constitutional Law vacancy created by Robinson's rescission of her acceptance, 2) the vacancy created by Argrett's decision to extend her sabbatical, 3) the vacancy created by the decision of a professor named Ramsey to leave the faculty, and 4) the Property Law vacancy created by the suspension of a Property Law professor. Plains. Mot. at 42.

In Martin's view, three positions were vacant as of October 1997. Accordingly, Bullock recommended that three professors be hired and three offers were made. When only two professors accept the APT's offer, a vacancy was created. According to Martin, additional vacancies were then created by the decisions of Argrett and Ramsey. Finally, another vacancy was created by the school's suspension of one of its Property Law professors.

HU, on the other hand, argues that the decisions it made were perfectly appropriate given the

school's changing staffing needs. First, while HU admits that the Constitutional Law position remained vacant until after February of 1998, HU argues that it ultimately decided not to fill the position because of the staffing changes that occurred in the Spring of that year.

According to Bullock, in October of 1997, she had the budgetary resources to fill three positions for the 1998-99 academic year. She claims that the APT was charged to fill these positions and that offers were in fact made. She further claims that even at the time Robinson rescinded, Bullock's staffing needs had changed. At that point in time, instead of offering the Constitutional Law position to another professor, Bullock claims that she needed a professor to teach Tax, Property, and Trusts & Estates. With only enough funds remaining in the budget to cover one position, Bullock decided not to hire a Constitutional Law professor as originally planned, but instead decided to hire a professor to cover the Tax, Property, and Trusts & Estates courses. This decision led to the hiring of Vallario. As stated by Bullock:

[a]ctually it was fortuitous that Reggie Robinson didn't accept the offer. Although establishing a presence in civil rights and constitutional law was important, the priority had to be courses already in the curriculum and in need of coverage by full-time faculty. And that is what tax and property and trusts and estates were.

Bullock Dep. at 184:7-14.

Martin counters that she offered several "suggestions" for reorganizing the faculty in order to accommodate her, but that these alternatives were never considered. For example, Martin wanted HU to ask Professor Cunningham to, in essence, relinquish her promotion and agree not to teach Labor and EEO Law so that Martin could teach those courses. Plains. Statement at 52 ¶ 246. Martin also suggested that HU reassign newly promoted Mtima's responsibilities as well. Instead of teaching Torts I and II, courses for which he had been promoted to teach, Martin suggested that HU ask him to teach Property courses instead. *Id.* at 247.

E. *Only HU's Decisions Not to Reappoint Martin or Offer Her Another Position Are Cognizable*

***11** It is settled in this circuit that an act, claimed to be retaliatory, must constitute an adverse employment action. An adverse action is one that has materially adverse consequences affecting the terms, conditions, or privileges of her employment such that a reasonable finder of fact could conclude that the plaintiff has suffered objectively tangible harm. *Brown v. Brody*, 199 F.3d 446, 457 (D.C.Cir.1999). Two of Martin's retaliation claims easily meet this criterion: 1) the decision, formalized in Bullock's letter of November 3, 1997, not to reappoint her as Visiting Associate Professor, and 2) the decision, formalized in Bullock's letter of April 8, 1998, rejecting Martin's application for any position on the HU faculty. Combined, they led to Martin's dismissal and the loss of her job.

It is equally clear that the other acts of which she complains, the conversion of the Constitutional Law/Civil Rights position into a Visiting Tax, Trust position and the decision to leave certain faculty positions vacant, do not qualify as adverse actions. They lack a direct and immediate impact upon Martin that would permit them to be characterized as causing objectively tangible harm. While these acts ultimately led, in Martin's view, to her departure from HU despite her desire to stay in any faculty position, they did not in themselves cause her any harm cognizable as retaliatory.

In this context, the decision in *Page v. Bolger*, 645 F.2d 227 (4th Cir.1981) is particularly instructive. In that case, Page, an African American, challenged his not being promoted by an all-white review committee. In addition to his claim as to the promotion itself, plaintiff tried to create an additional claim as to the selection of the review committee that made the decision. The Fourth Circuit, however, rejected that theory and concluded that Title VII applies only to ultimate employment decisions such as hiring or discharging:

Among the myriad of decisions constantly being taken at all levels and with all degrees of significance in the general employment contexts covered by Title VII there are certainly others than those we have so far specifically identified that may be so considered [,] for example, entry into training programs, *Wright,* 609 F.2d at 712 n. 10. By the same token, it is obvious to us that there are many interlocutory or mediate decisions having no

immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of § 717 and comparable provisions of Title VII. We hold here merely that among the latter are mediate decisions such as those concerning composition of the review committees in the instant case that are simply steps in a process for making such obvious end-decisions as those to hire, to promote, etc.

Id. at 233.

An even closer case, because it arises in a university context, is *Foley v. University of Houston System*, 324 F.3d 310, 316 (5th Cir.2003), in which the court, reasoning as the Fourth Circuit did in *Page*, stated:

***12** Dr. Hutto's retaliation claim does not fare as well. The record below fails to establish the second essential element of her claim, *i.e.*, that an adverse employment action occurred. Under our jurisprudence, an adverse employment action means an ultimate employment decision, such as hiring, granting leave, discharging, promoting, and compensating. *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir.1995). The employment actions alleged by Hutto do not meet that standard. Viewing the record in the light most favorable to her, Hutto is complaining of the following employment actions on the part of the Appellants: (1) they schemed to remove her as Chair of the Education Division in August 1996, and to replace her with Cheryl Hines; (2) they tried to undermine an important program

within the Division known as the Center for Professional Development and Technology (CPDT), which reflected upon Hutto's leadership; (3) Haynes and Hines reprimanded her for circulating unauthorized flyers regarding the Administration and Education Program (AED) and generally attempted to undermine that program; and (4) they refused to attend the Phi Kappa Phi initiation ceremony the year that Hutto was the president of the organization. None of these adverse actions qualify as ultimate employment decisions. Her loss of the title of Chair of the Division in August 1996 did not result in any loss of compensation or benefits and she remained on the faculty as a tenured professor. Furthermore, that particular claim is clearly barred by the statute of limitations. The other listed allegations fall far short of ultimate employment decisions.

Id. at 317. *Accord: Saleh v. Virginia State U.*, 1999 U.S. Dist. Lexis 21842 *50 (E.D.Va.1999)("Siddiqi's final claim is that he has applied repeatedly for graduate faculty status, to no avail until just recently. Because this claim involves only the process by which Siddiqi has secured a change in job title, it is not cognizable under the doctrine of *Page v. Bolger*, 45 F.2d 227 (4th Cir.1981)").

Similarly here, the mediate decisions of Bullock to convert one faculty position from Constitutional Law to Tax, Trust and Estates and to leave other faculty positions open do not form the bases for independent claims of relief because they are not adverse actions. They, therefore, may not be

submitted to the jury as independent claims of relief in addition to the claims predicated on Bullock's letters that (1) advised Martin that she was being rejected for reappointment and (2) advised Martin that her application for another position on the HU faculty was rejected.

IV. *Plaintiff's Breach of Contract Claim*

In her final claim, Martin attempts to re-establish that an oral contract was made by Howard to extend Martin a tenure-track position after her visitorship ended. Chief Judge Hogan has already rejected her breach of contract claim, *Martin,* 1999 U.S. Dist. LEXIS 19516 at *20-22, and I cannot and will not accept plaintiff's demand that I reach a contrary conclusion.

V. *Plaintiff's Renewal of Her August 3, 2001 Motion for a Default Judgment Based on Howard University's Production of Late, Incomplete, and Falsified / Tainted Evidence*

***13** In her August 3, 2001 motion, plaintiff sought to waive the 15-page limit previously established by this court. That motion was denied by the Chief Judge on September 4, 2001. With total disregard for the limits established by the Chief Judge, plaintiff now seeks to renew her previous motion. However, it has not escaped the court that although her current motion, contained within her motion for summary judgment, is only three pages long, plaintiff seeks to include, by incorporation, those arguments made in her original 43-page motion, excluding exhibits: "Plaintiff renews her August 3, 2001 *Motion for a Default Judgment, Due to Howard*

University's Production of Late, Incomplete and Falsified/Tained Discovery and incorporates, by reference all arguments made therein ...." Plains. Mot. at 48. A document that is 43 pages long does not become 15 pages long because it is attached to a document that is 15 pages long. A judicial order cannot be that easily evaded. Plaintiff's renewed motion should be denied.

CONCLUSION

For the reasons articulated above, I, therefore, recommend that *Plaintiff's Motion for Summary Judgment* [# 289] be denied. I further recommend that *Howard University's Motion for Summary Judgment* [# 288] be granted as to plaintiff's claim of retaliation based on HU's decision to leave certain positions vacant, [FN7] but denied as to all other portions.

FN7. In the amended complaint, plaintiff characterizes HU's decision to leave certain positions vacant as the second and fourth acts of retaliation committed against her. Plains. Amended Compl. at 49, 64.

Failure to file timely objections to the findings and recommendations set forth in this report may waive your right of appeal from an order of the District Court adopting such findings and recommendations. *See Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN,
Plaintiff,
v.
HOWARD UNIVERSITY, et al.,
Defendants.

No. 99-1175 (TFH)
September 16, 2005

ORDER

Pending before the Court are the Report and Recommendation issued by Magistrate Judge Facciola, Plaintiff's objection, and Defendants' response to that objection. After reviewing the Report and Recommendation, the parties' relevant filings, and the entire record in this matter, this Court finds no factual or legal basis for Plaintiff's objection. For the reasons provided in the Report and Recommendation, it is hereby **ORDERED** that:

1. Plaintiff's Motion for Summary Judgment is denied.

2. Defendants' Motion for Summary Judgment is granted as to Plaintiff's claims of retaliation based on decisions to convert or leave vacant certain positions, and denied as to all other parts.

September 16, 2005
/ s / Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN,

Plaintiff,

v.

HOWARD UNIVERSITY, et al.,

Defendants.

No. 99-1175 (TFH)
October 21, 2005

ORDER

Pending before the Court are the Plaintiff's Rule 59 Motion, filed September 26, 2005, Defendants' Response to Plaintiff's Rule 59 Motion, filed October 7, 2005, and Plaintiff's Reply, filed October 10, 2005. Both parties have also asked the Court to reconsider their summary judgment motion on Plaintiff's contract claim. After reviewing the parties' filings, and the entire record in this matter, requests and for the reasons stated from the bench at the hearing that was held on Thursday, October 20, 2005, it is hereby **ORDERED** that

1. The record is clarified to reflect that Plaintiff did file proper statements pursuant to Local Civil Rule 56.1 in support of her motion for summary judgment and in opposition to Defendants'

summary judgment motion. Further, Defendants also filed a statement of facts in its opposition to Plaintiff's summary judgment motion, and while not properly styled as a statement of facts in dispute, the filing was sufficient for the Court to discern that there remain material facts in dispute.

2. The record is further clarified to indicate that the Court's September 16, 2005 order adopting Magistrate Judge Facciola's Report and Recommendation of October 20, 2003 did not in any way dismiss Plaintiff's contract claim, which is still pending.

3. Further, both parties' request renewed for summary judgment on Plaintiff's contract claim are denied as the record reflects remaining genuine issues of material fact.

SO ORDERED.

October 21, 2005

/s/

Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN,
Plaintiff,
v.
HOWARD UNIVERSITY, et al.,
Defendants.

No. 99-1175 (TFH)
January 10, 2006

ORDER

Pending before the Court are several motions, including several motions in limine. After reviewing the parties' filings and the entire record in this matter, for the reasons stated at the hearings that were held on December 20, 2005, and January 5, 2006, and in accordance with the opinions dictated at the conclusion of those hearings, it is hereby

ORDERED that

Plaintiff's Motion in Limine to Exclude Irrelevant, Unduly Prejudicial Allegations of "Non-Collegiality" and "Bad Judgment" [#342] is DENIED, and it is further

ORDERED that

Defendants' Motion in Limine Clarifying That Plaintiff's Retaliation Claim Is Limited to Decision Not to Hire Plaintiff for EEO/Labor Law Position [#343] is GRANTED in part, except that evidence of the alleged premature eviction may still be presented as part of Plaintiff's claim of retaliation, and it is further

ORDERED that

Defendants' Motion in Limine to Preclude Hearsay Testimony that Leonard Harrison "Carried a Stick," Had a Criminal Record, or Was Violent [#346] is DENIED, and it is further

ORDERED that

1.Defendants' Motion in Limine to Preclude Plaintiff from Offering Cumulative Lay Witness Testimony from Her Ex-Husband, Fiancé, Daughter, Brother Niece, Best Friend, and Daughter's Best Friend Regarding "Observations" of Her Alleged Emotional and Financial Difficulties [#345] is GRANTED in part, but Plaintiff may use two of these witnesses to proffer testimony relating to their observations of Plaintiff's emotional and financial difficulties, and it is further

ORDERED that

Defendants' Motion in Limine to Preclude Plaintiff from Introducing Non-Expert Testimony about the Standard of Care for University Campus Police Departments and what Howard "Should Have Done"

or what Individual Lay Witnesses "Would Have Done" In Response to a Homeless Man's Efforts to Contact Plaintiff [#348] is GRANTED in part to the extent that Plaintiff's non-expert witnesses cannot testify regarding what should have been done, and it is further

ORDERED that

Defendants' Motion in Limine to Preclude Professor Derrick Bell, Professor Lani Guinier, Professor Adrienne Wing, and Professor James McPherson from Testifying About Their Alleged Contact with a "Leonard Harrison" [#349] is GRANTED, and it is further

ORDERED that

Plaintiff's Motion to Reopen Discovery to Depose Dean Denise Purdie-Spriggs and Prof. Steven Jamar and to Allot Sufficient Trial Time for Rebuttal [#361] is DENIED, and it is further

ORDERED that

Plaintiff's Motion to Compel Updated Discovery, Rule 37(A)(4) Sanctions, and for Production of Additional Personnel Files Necessary to Assess Damages [#370] is GRANTED in part, only to the extent that Defendants must provide the updated discovery regarding Professors Cunningham and Mtima sought by Plaintiff, the rest of the motion is DENIED, and it is further

ORDERED that

Plaintiff's Motion to Bifurcate Trial, Pursuant to Fed. R. Civ. P. 42(B) [#364] is DENIED, and it is further ORDERED that

Defendants' Motion in Limine to Preclude Argument or Evidence Concerning Plaintiff's Daughter's State of Mind Including Plaintiff's Daughter's Alleged Suicide Note [#347] is GRANTED, and it is further ORDERED that

Plaintiff may only present evidence of the conversion of certain faculty positions or the leaving of certain faculty positions vacant as a part of her contract breach claim if Defendants offer the defense of impossibility, and it is further ORDERED that

If the parties have conferred again on the proposed voir dire questions, per the Court's oral order at the January 5, 2006 hearing, then the parties shall submit by Wednesday, January 11, 2006 revised proposals for voir dire questions; if the parties have not made any progress on this issue, they shall by Wednesday, January 11, 2006 notify the Court via written notice.

SO ORDERED.
January 10, 2006
/ s /
Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN,
Plaintiff,
v.

HOWARD UNIVERSITY, et al.,
Defendants.

No. 99-1175
(TFH)
March 30, 2006

ORDER

Pending before the Court are several motions. After reviewing the parties' filings and the entire record in this matter, it is hereby **ORDERED** that

1. Defendants' Motion in Limine to Preclude Plaintiff from Offering Argument or Evidence Regarding Alleged Damages [#344] is DENIED, and it is further ORDERED that

2. Plaintiff's Motion for a Hearing to Clarify February 16, 2006 Order Denying Plaintiff Leave to File Motion for Reconsideration of Order Granting Defendant's Motion in Limine Limiting Her Retaliation Claims to Her Rejection for the EEO/Labor Position, in Light of Rule 60(b)(2), Requiring Reconsideration of Judgments Based on Fraud, Misrepresentation, or other Misconduct [#400] is DENIED,

and it is further ORDERED that

3. The record is clarified that although the bases for Plaintiff's retaliation claim were limited by the September 16, 2005 order adopting the Report & Recommendation, there are still two bases for Plaintiff's retaliation claim that are to be tried: (I) Plaintiff's alleged premature eviction from her office, and (II) Plaintiff's rejection for any tenure-track position at Howard University Law School, which occurred in December 1997, and was reaffirmed in April 1998.

SO ORDERED.

March 30, 2006

/s/
Thomas F. Hogan /s/
Chief Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN,
Plaintiff,

v.

HOWARD UNIVERSITY, et al.,
Defendants.

No. 99-1175
(TFH)
March 31, 2006

ORDER

Pending before the Court is Plaintiff's Motion for Rule 60(B) Relief from Judgment/Orders Based on New, Controlling Case Law, *Rochon v. Gonzales,* D.C. Cir., Decided February 28, 2006 [416]. After reviewing the parties' filings and the entire record in this matter, it is hereby **ORDERED** that Plaintiff's Motion for Rule 60(b) Relief is **DENIED.**

In her motion, Plaintiff asks that two of her original retaliation claims be reinstated: (1) the alleged withholding of three vacant positions from the Appointments, Promotions and Tenure ("APT") Committee of Howard University Law School, for which Plaintiff was qualified, and 2) conversion (or feigned conversion) of a Constitutional Law position

into a Tax Law position, allegedly in response to Plaintiff's application for the Constitutional Law Position. These retaliation claims were dismissed by Magistrate Judge Facciola in his Report & Recommendation, dated October 20, 2003 ("R&R"). Magistrate Judge Facciola found that these claims could not be considered retaliation under the law because they did not fall under the definition of "adverse employment actions." *See* Report and Recommendation at 20-22. This Court adopted the R&R on September 16, 2005. Plaintiff now argues that these retaliation claims should be restored in light of a recent D.C. Circuit decision, *Rochon v. Gonzales,* 2006 U.S. App. Lexis 5028 (D.C. Cir. 2006). This Court disagrees.

In *Rochon,* the plaintiff, a Federal Bureau of Investigations agent ("FBI") sued the Attorney General in his official capacity, claiming the FBI had discriminated and retaliated against him when the FBI, contrary to its policy, refused to investigate death threats made against Rochon and his wife. 2006 U. S. App. Lexis 5028 at *1-2. Rochon alleged that in 1993-94 the Philadelphia field office of the FBI received evidence of credible death threats to Rochon and his wife by an inmate in a federal prison and contrary to policy and normal practices, the FBI did not investigate the threats and did not take steps to protect the Rochons, even after it indicated it would. Rochon brought the suit in district court, alleging the FBI's failure to investigate was discriminatory and retaliatory.1 The D.C. Circuit stated the issue presented was whether the alleged adverse action in a retaliation case must be an adverse *personnel* action. *Id.* at * 15. The court found

that it did not have to be a personnel decision or directly relate to one's employment, and held that to support a claim of retaliation, a plaintiff must demonstrate that the employer's challenged action would have materially affected a reasonable employee such that the action would dissuade a reasonable worker from making or supporting a charge of discrimination, or otherwise engaging in protected activity. *Id.* at *22. In *Rochon,* the court found that a reasonable FBI agent could well be dissuaded from engaging in protected activity if he knew that doing so would leave him unprotected by the FBI in face of threats against him or his family, contrary to his employer's policy and usual practices. *Id.* at 23.

While *Rochon* does broaden what types of actions may constitute "adverse actions" in retaliation cases, the instant case is distinguishable from *Rochon.*

Even under the framework laid out in *Rochon,* in order to state a retaliation claim, the plaintiff must allege his or her employer took actions that were significant and materially affected the plaintiff such that a reasonable employee would be dissuaded from engaging in protected activity if he or she knew such actions would be taken. Deciding to hire for one type of faculty position and not another and leaving positions vacant are not significant and material enough to truly discourage a reasonable professor from engaging in protected activity, especially when faced with an alleged hostile work environment. This is particularly the case, as with Plaintiff, when that reasonable professor is not guaranteed any tenure-

track position and his or her visitorship contract is about to expire. In fact, the alleged adverse actions in the instant case are a far cry from failing to protect a field agent from death threats. Further, granting such a motion would render the D.C. Circuit's significant and material limitation meaningless.

March 31, 2006

SO ORDERED.

/s/
Thomas F. Hogan
Chief Judge

1There is also a long history of discrimination allegations and settlements in this case. Rochon had an earlier case of racial discrimination and retaliation with the FBI, which was settled in 1990, and according to the settlement agreement the FBI agreed not to retaliate further. *Id.* at *2-3. There was a second lawsuit and settlement in 1994, where the FBI agreed to a corrective statement about Rochon's performance, agreed to refrain from interfering with his future employment opportunities, and paid him damages.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN,

Plaintiff,

No. 99-1175

v.

HOWARD UNIVERSITY, et al.,

Defendants.

NOTE FROM JURY

1) Wives are typically female.
Is #1(c) an automatic "yes" just because plaintiff is female.

2) Please define sexual harassment.

Date: 4/28/06
Time: 11:30

/s/
Foreperson

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN,

Plaintiff,

No. 99-1175

v.

HOWARD UNIVERSITY, et al.,

Defendants.

VERDICT FORM

AS JURORS, YOU MUST EACH UNANIMOUSLY AGREE ON THE ANSWERS TO THIS VERDICT FORM. IT MUST BE SIGNED AND DATED BY THE JURY FOREPERSON.

1. Did the Plaintiff prove by a preponderance of the evidence that:

a) Mr. Harrison subjected her to conduct that was sufficiently severe and pervasive to alter the terms and conditions of her employment?

__X__ YES _____ NO

b) Mr. Harrison's conduct was unwelcome?

__X__ YES _____ NO

c) Mr. Harrison's conduct was sexual in nature or because of Plaintiff's gender?

_____ YES __X__ NO

d) Howard University knew or should have known of the alleged conduct?

__X__ YES _____ NO

e) Howard University failed to take proper remedial action that was reasonably calculated to end the harassment?

__X__ YES _____ NO

If you answered "NO" to <u>any</u> of these questions, you have found for the Defendant Howard University on the hostile work environment claim and should go to Question 5. If you answered "YES" to <u>all</u> of the above questions, go to Question 2.

2. Did Plaintiff prove by a preponderance of the evidence that she suffered damages as a result of Mr. Harrison's conduct?

_____ YES _____ NO

If you answered "NO," you have found for the Defendant Howard University on the hostile work environment claim and should go to Question 3.
If you answered "YES" go to Question 3.

3. Did Howard University prove by a preponderance of the evidence that it exercised reasonable care to prevent or correct any sexually harassing behavior by Mr. Harrison?

_____ YES _____ NO

If you answered "YES" you have found for the Defendant Howard University on the hostile work environment claim and should go to Question 5.

If you answered "NO," you have found for Plaintiff, Dawn Martin on the hostile work environment claim, and should go to Question 4.

4. State the amount of compensatory damages, if any, that Plaintiff proved she is entitled to based on her hostile work environment claim?

   $_____ (State the amount or, if none, white the word "none.")

RETATLIATION: APT COMMITTEE RECOMMENDATION

5. Did the plaintiff prove by a preponderance of the evidence that:
   a) She was engaged in legally protected activity when she notified the Dean's office of Mr. Harrison's conduct?

      _____ YES _X_ NO

   b) Howard University knew of her behavior that constituted legally protected activity?

      _____ YES _X_ NO

c) After learning of Plaintiff's protected activity, the Appointments, Promotion and Tenure Committee of Howard University Law School (hereinafter, "APT Committee") intentionally retaliated against Plaintiff because of her protected activity and that the protected activity was a substantial factor in the APT Committee's failure to recommend Plaintiff for the EEO/Labor Law tenure track position?

_____ YES _X_ NO

If you answered "NO" to any of these questions, you have found for the Defendant Howard University on the first claim of retaliation and should go Question 3.

If you answered "YES" to all of the above questions, go to Question 6.

6. Did Howard University produce evidence of legitimate, non-retaliatory reasons for the APT Committee's decision not to recommend Plaintiff for the EEO/Labor position but to instead recommend Professor Cunningham?

_____ YES _____ NO

If you answered "YES" to this question, you should go to Question 7.

If you answered "NO" to this question, you have found for you have found for Plaintiff Dawn Martin on the first retaliation claim and should go to Question 8.

7. Did the plaintiff prove by a preponderance of the evidence that the legitimate, non-retaliatory reasons offered by Howard University were false and pretextual or that the real and motivating reason for the APT Committee's recommendation of Professor Cunningham as opposed to Plaintiff was retaliation?

_____ YES _____ NO

If you answered "YES" to this question, you have found for Plaintiff Dawn Martin on the first retaliation claim.

If you answered "NO" to this question, you have found for Defendant Howard University on the first retaliation claim and should go to Question 8.

RETATLIATION: APT COMMITTEE RECOMMENDATION

8. Did the plaintiff prove by a preponderance of the evidence that:
   a) She was engaged in legally protected activity when she notified the Dean's office of Mr. Harrison's conduct?

_____ YES __X__ NO

b) Howard University knew of her behavior that constituted protected activity?

_____ YES __X__ NO

c) Associate Dean Newsom's May 1998 letter to Plaintiff ordering Plaintiff to return her keys to her office and leave her office in June 1998 constituted an adverse action?

d) After learning of the Plaintiff's protected activity, Associate Dean Newsom intentionally retaliated against Plaintiff because of her protected activity and that the protected activity was a substantial factor in sending the May 1998 letter to Plaintiff ordering Plaintiff to return her keys to her office and leave her office in June 1998?

_____ YES __X__ NO

If you answered "NO" to <u>any</u> question above, you have found for Defendant Howard University on the second retaliation claim and should go to Question 11.

If you answered "YES" to <u>all</u> of the questions above, go to Question 9.

9. Did Howard University produce evidence of legitimate, non-retaliatory reasons for Associate

Dean Newsom's letter ordering Plaintiff to return her keys and vacate her office?

_____ YES _____ NO

If you answered "YES" to this question, go to Question 10.
If you answered "NO" to this question you have found for Plaintiff Dawn Martin on the second retaliation claim, and should to go Question 11.

10. Did the Plaintiff prove, by a preponderance of the evidence, that the legitimate, non-retaliatory reasons offered by Howard were false and pretextual or that the real motivating reason for Associate Dean Newsom's letter was retaliation?

_____ YES _____ NO

If you answered "YES," you have found for Plaintiff Dawn Martin on the second retaliation claim. Go to Question 11.

BREACH OF CONTRACT

11. Did the Plaintiff prove by a preponderance of the evidence that Professor Taslitz promised her that her employment with the University would continue after the expiration of her two-year visitorship, either by giving her a tenure-track position or by renewing her visitorship until a tenure=track position became available?

_____ YES _X_ NO

If you answered "YES," go to Question 12.
If you answered "NO," you have found for Defendant Howard University on the breach of contract claim and your deliberations are complete. The jury foreperson should sign and date this Verdict Form and you should notify the Court's courtroom deputy, Mr. Smith.

12. Did the Plaintiff prove by a preponderance of the evidence that Professor Taslitz had the actual or apparent authority to enter into a binding employment agreement on behalf of Howard University?

_____ YES _____ NO

If you answered ""YES" go to Question 13.
If you answered "NO" you have found for Defendant Howard University on the breach of contract claim and your deliberations are complete. The jury foreperson should sign and date this Verdict Form and you should notify the Court's courtroom deputy, Mr. Smith.

13. Did the Plaintiff prove by a preponderance of the evidence that the oral promises made by Professor Taslitz could be performed within one year?

_____ YES _____ NO

If you answered ""YES" go to Question 14.
If you answered "NO" you have found for Defendant Howard University on the breach of

contract claim and your deliberations are complete. The jury foreperson should sign and date this Verdict Form and you should notify the Court's courtroom deputy, Mr. Smith.

14. Did the Plaintiff prove by a preponderance of the evidence that Professor Taslitz agreed upon the essential terms of her employment after the expiration of her two-year visitorship?

_____ YES _____ NO

If you answered ""YES" go to Question 15.
If you answered "NO" you have found for Defendant Howard University on the breach of contract claim and your deliberations are complete. The jury foreperson should sign and date this Verdict Form and you should notify the Court's courtroom deputy, Mr. Smith.

15. Did the Plaintiff prove by a preponderance of the evidence that Howard University breached a contract with Plaintiff when the University declined to offer Plaintiff a tenure track position and failed to renew her visitorhsip when her two-year visitorship expired?

_____ YES _____ NO

If you answered ""YES," you have found for Plaintiff Dawn Martin on the breach of contract claim.
If you answered "NO," you have found for Defendant Howard University

Your deliberations are complete. The jury foreperson should sign and date this Verdict Form and you should notify the Court's courtroom deputy, Mr. Smith.

___/s/_____ 4/28/06

Jury Foreperson Date

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN,
Plaintiff,

v.

No. 99-1175
August 21, 2006

HOWARD UNIVERSITY, et al.,
Defendants.

JUDGMENT ON THE VERDICT
FOR DEFENDANT

This cause having been tried by the Court and a Jury, before the Honorable Thomas F. Hogan, Judge presiding, and the issues having been duly tried and the Jury having rendered its verdict; now therefore, pursuant to the verdict,

IT IS ORDRED, ADJUDGED AND DECREED that plaintiff(s)"
DAWN V. MARTIN
take nothing on the complaint against defendant(s):
HOWARD UNIVERSITY AND HOWARD UNIVERSITY SCHOOL OF LAW

And that the said defendant(s) have and recover costs from said plaintiff(s).

Dated: August 21, 2006
NANCY MAYER-WHITTINGTON, Clerk /s/

Slip Copy, 2006 WL 2850656 (D.D.C.)

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
District of Columbia.
Dawn V. MARTIN, Plaintiff,
v.
HOWARD UNIVERSITY, et al., Defendants.
No. 99-1175(TFH).
Oct. 4, 2006.

Dawn V. Martin, Law Offices of Dawn V. Martin, Washington, DC, for Plaintiff.

Brian Lawrence Schwalb, Venable LLP, Phillip A. Lattimore, III, Angela Ranel Williams, Howard University Office of the General Counsel, Frederick D. Cooke, Jr., Rubin, Winston, Diercks, Washington, DC, Kishka-Kamari M. Ford, Venable, LLP, Vienna, VA, for Defendants.

MEMORANDUM OPINION

THOMAS F. HOGAN, Chief Judge.

I. Background

***1** Plaintiff Dawn Martin, a Visiting Professor at Howard University School of Law from July 1996 through May 1998, brought this action against several defendants on May 14, 1999. On April 28, 2006, the jury in this case found for the remaining Defendants, Howard University and Howard University School of Law (collectively, "Howard"), on

all three counts-sexual harassment, retaliation, and breach of contract. Since that time, both Plaintiff and Defendants have filed a number of post-trial motions. For the reasons stated below, the Court denies all of Plaintiff's post-trial motions and denies all of Defendants' post-trial motions as moot.

A. Factual Background

Plaintiff alleges that she was the victim of a hostile work environment in violation of Title VII and the District of Columbia Human Rights Act as a result of the conduct of Mr. Leonard Harrison, a homeless person who was neither an employee of, nor a student at, Howard. Specifically, Mr. Harrison sent Plaintiff two letters that were hand-delivered to Plaintiff's office, left voice mail messages for her, and attempted three personal visits to Plaintiff's office (Plaintiff was only in her office during the third visit and Harrison was chased out by a security officer), and at one point stated that he thought Plaintiff was his wife. Plaintiff has claimed that Howard's response and inaction towards Mr. Harrison is a violation of Title VII.. Plaintiff's other two claims include retaliation in violation of Title VII and breach of contract. Plaintiff asserted that because of her complaints regarding Mr. Harrison and her requests for protection from Mr. Harrison, the administration retaliated against her in several ways. Through the pre-trial process, Plaintiff's retaliation claims were narrowed to the two alleged acts: the then Dean of the law school, Dean Bullock, got the Appointments, Promotions and Tenure Committee ("APT Committee") to not recommend Plaintiff for the EEO/Labor Law tenure-track

position she sought and to instead recommend Professor Cunningham, and that Dean Newsom sent Plaintiff a letter asking her to vacate her office early, in May 1998, rather than in June or July 1998 when most professors had to leave. *See* Order [# 422], dated March 30, 2006. Plaintiff also alleges she had an oral contract that her renewed visitorship would be renewed until a tenure-track position became available, at which time she would get that position. Plaintiff alleged the contract was breached when she was not selected for any tenure-track position.

B. The Verdict and Findings at Trial

At trial, Plaintiff put on a number of witnesses.[FN1] At the close of Plaintiff's case, both Plaintiff and Defendants moved for a judgment as a matter of law on all three claims. The Court reserved ruling on the motions and let the Defendants present their case. At the close of the Defendants' case, the parties renewed their motions as a matter of law, on which the Court again reserved ruling. The jury came back with a verdict for the Defendants on all three claims.

FN1. The Court notes that during the trial Plaintiff discharged two different attorneys and eventually represented herself towards the end of the trial through the jury verdict.

Based on the jury verdict form, the jury found the following key facts.

*2 *Sexual Harassment/Hostile Work Environment Claim*-That Mr. Harrison subjected Plaintiff to

unwelcome conduct so sufficiently pervasive or severe as to alter the terms and conditions of her employment and that Defendants knew or should have known of the unwelcome conduct and failed to take proper remedial action to correct the conduct. However, the jury also found that Mr. Harrison's conduct was not sexual in nature, nor was not because of Plaintiff's gender, and thus found for Defendants on this claim.

Retaliation-The jury found that Plaintiff was not engaged in protected activity when she contacted the Dean's office about Mr. Harrison's conduct and that Defendants did not know of Plaintiff's protected activity and that Defendants did not intentionally retaliate against Plaintiff because of her protected activity and that her protected activity was not a substantial factor in the APT Committee's decision not to recommend Plaintiff for the Labor Law/EEO tenure-track position or in the decision to send Plaintiff a letter asking her to turn in her keys and leave her office (and that such a letter was not an adverse action).

Breach of Contract-The jury found that Plaintiff did not prove she had an oral promise, as alleged, from Professor Taslitz that Howard would keep renewing her visitorship and then slide her into a tenure-track position when one became available, and thus found for Defendants on this claim.

C. Summary of Post-Trial Motions

Plaintiff has filed three renewed motions for judgment as a matter of law, pursuant to Federal

Rule of Civil Procedure 50(b), or in the alternative, for a new trial, pursuant to Federal Rules of Civil Procedure 59 and 60. Each motion is related to one of the three different claims and each also incorporates Plaintiff's arguments made in her previous motions for judgment as a matter of law.[FN2] Defendants also filed three renewed motions for judgment as a matter of law on each of three claims. Defendants also incorporated all of their arguments from their original motions for judgment as a matter of law.

FN2. Plaintiff also filed, by leave of the Court, a Supplement to Her Pending Motion for Judgment on Her Retaliation Claims with New Case Law Holding that the Employer's Failure to Fill a Vacancy May Constitute Retaliation, *Ruggieri v. Merit Systems Protection Board* .

II. Relevant Legal Standards

A. Rule 50(b)

A Rule 50(b) motion "should not be granted unless the evidence, together with all inferences that can reasonably be drawn therefrom, is so one-sided that reasonable jurors could not disagree on the verdict." *Elam v. C & P Telephone Co.*, 609 F.Supp. 938, 940 (D.D.C.1984) (internal citations omitted). In reviewing the evidence the court should draw all reasonable inferences in favor of the nonmoving party. *Thomas v. Mineta*, 310 F.Supp.2d 198, 203 (D.D.C.2004). A court may "neither assess witness credibility nor weigh evidence" in deciding such a

motion. *Nyman v. Chairman, Federal Deposit Insurance Corp.*, 1997 WL 243222, *2 (D.D.C.1997).

B. Rule 59

Under Rule 59 of the Federal Rules of Civil Procedure, a new trial may be granted in a case that had a jury trial for "any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." To preserve the function of the jury, new trials should not be granted unless "a solid basis for doing so" exists. *Warren v. Thompson*, 224 F.R.D. 236, 239 (D.D.C.2004) (internal citations and quotations omitted). Further, such a motion should only be granted when the court is convinced that the jury verdict was a "seriously erroneous result" and where denial of the motion will result in a "clear miscarriage of justice." *Id.* (internal citations and quotations omitted). Generally, a new trial may only be granted when a manifest error of law or fact is presented. Further, the standard for granting a new trial is not whether minor evidentiary errors were made. *See, e. g., Nyman*, 1997 WL 243222 at * 3.

C. Rule 60(b)(3)

***3** Rule 60(b)(3) of the Federal Rules of Civil Procedure provides that a party may seek relief from a final judgment or order for fraud, misrepresentation, or other misconduct of an adverse party. To prevail, the moving party must prove by clear and convincing evidence some sort of fraud, misrepresentation or other misconduct. *See Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1477 (D.C.Cir.1995). If the moving party

makes such a showing, the court must balance "the interest in justice with the interest in protecting the finality of judgments." *Summers v. Howard University*, 374 F.3d 1188, 1193 (D.C.Cir.2004). The moving party must show actual prejudice has resulted from the misconduct, misrepresentation or fraud. *Id.* Finally, it is in the court's discretion to grant such a motion. *Id.*

III. Plaintiff's Post-Trial Motions

A. Plaintiff's Renewed Motion As a Matter of Law As to Sexual Harassment Claim

In Plaintiff's first post-trial motion, Plaintiff's Renewed Motion for Judgment on Her Sexual Harassment Claim, Pursuant to Rule 50(B), or in the Alternative, for a New Trial, Pursuant to Rules 59 and 60 ("Plaintiff's Renewed Motion re Sexual Harassment"), Plaintiff asks the Court to enter a judgment on her sexual harassment claim, notwithstanding the jury verdict, as a matter of law, or, in the alternative to grant her request for a new trial or provide her with relief from the judgment due to alleged fraud.

Plaintiff's Rule 50(b) motion essentially focuses on the jury's finding that Mr. Harrison's conduct was not sexual in nature or was not due to Plaintiff's gender because this was the only factual finding that resulted in the jury finding for Defendants on the sexual harassment claim. Plaintiff argues that the jury's finding is contrary to this Court's 1999 opinion in this case, which granted in part and denied in part Defendants' motion to dismiss, and is

contrary to Defendants' admissions and the evidence in record. Plaintiff further argues that the jury's notes to the Court during its deliberation demonstrate juror confusion over the law, perhaps in support of her Rule 59 motion. Plaintiff also states that the Court's rejection of her proposal to instruct the jury on the criminal definition of stalking that explained that "stalking may be a form of sexual harassment," in the written jury instructions added to juror confusion.

Defendants correctly assert that the Court's 1999 opinion did not preclude the jury from finding that Mr. Harrison's conduct was neither sexual in nature, nor was because of Plaintiff's gender. The Court's 1999 opinion was not a decision on the merits, but rather found that the Plaintiff had satisfied her burden in putting forth sufficient facts to make out a claim that could go to a jury for resolution. In its 1999 opinion, this Court even stated that as it was granting Defendants' motion to dismiss, or in the alternative for summary judgment, as to the individually-named defendants and as to the relevant defendants on Plaintiff's intentional infliction of emotional distress claim, that it was denying such motion with respect to the remaining counts, including Plaintiff's sexual harassment claim, because "those claims present material issues of fact which must be decided by a jury." *Martin v. Howard University,* 1999 U.S. Dist. Lexis 19516 at *22. Thus, this Court never found that Mr. Harrison's conduct was sexual in nature or because of Plaintiff's gender, but left this as a

question for the jury. *Id.* The jury verdict did not, therefore contradict the Court's 1999 decision.

*4 Plaintiff also argues the jury's finding that Mr. Harrison's conduct was not sexual in nature or because of Plaintiff's gender contradicts Defendants' admissions and cannot be supported by the evidence at trial.[FN3] Plaintiff states that Defendants admitted, through Dean Newsom and Dean Bullock at trial, that Mr. Harrison's conduct caused them concern about the safety not only of Plaintiff, but also of other women on campus. This sort of testimony, along with other evidence Plaintiff points to, does not, taken in the light most favorable to Defendants, indicate that Defendants admitted that Plaintiff's gender was the basis or the reason for Mr. Harrison's conduct.[FN4] Defendants never stipulated to this fact. It is in the purview of the jury to determine this fact, and even given the evidence cited by Plaintiff, there was still sufficient evidence in the record to support the jury's finding. The evidence in this case was not so one-sided that a reasonable jury could only have reached one determination: that Mr. Harrison's conduct was because of Plaintiff's gender or was sexual in nature. The jury did not hear or see evidence that Mr. Harrison's conduct involved conduct typical of sexual harassment such as groping, touching, or making sexual advances.[FN5] Also, there was evidence presented at trial that Mr. Harrison was also stalking at least one male professor at another university. Thus, the Court finds there was sufficient evidence for a reasonable jury to support its finding that Mr. Harrison's conduct was not

sexual in nature or because of her gender and that the evidence was not so one-sided such that the jury could only reach one conclusion.

FN3. Plaintiff also states that the Court took judicial notice during the trial that the relationship between a husband and wife is sexual in nature. There is simply no basis for this argument; the Court did not take judicial notice and simply made a comment to move along the examination of a witness. Plaintiff also argues the jury finding contradicts the dictionary definition of "wife." However, the jury did not decide the definition of "wife," rather they found that Mr. Harrison's conduct was not based on Plaintiff's gender, as discussed above, a reasonable finding supported by the evidence.

FN4. Defendants dispute whether some of this evidence was actually admitted at trial. Even assuming it was, it is not enough to show that the jury's finding was not sufficiently supported by the evidence presented at trial.

FN5. Although such specific actions are not necessary for a finding of a hostile work environment, here it was reasonable for the jury to find that even considering the conduct that did occur, for example the content of Mr. Harrison's letters and voice mails, including his statement that he was looking for his wife, that his conduct was not sexual in nature and was not because of Plaintiff's gender.

Plaintiff's second argument, perhaps in support of her Rule 59 motion, is that the juror notes demonstrate confusion concerning sexual

harassment. Plaintiff points to three juror questions that were asked in two separate notes. The first question was "what is meant by the terms and conditions of her [Plaintiff's] employment." However, this jury question was resolved in Plaintiff's favor and does not generally demonstrate confusion about sexual harassment. The second question and third question were asked together as follows:

(1) Wives are typically female. Is 1c an automatic 'yes' just because plaintiff is female.

(2) Please define sexual harassment.

The "1c" in the first question refers to the jury verdict form question that asked the jurors whether Mr. Harrison's conduct was sexual in nature or because of Plaintiff's gender. The Court answered the first of these questions by stating, "No, it is not an automatic 'yes'. You must base your decision on the evidence presented to you." [FN6] The Court answered the second question by referring the jurors back to Jury Instruction 23 as that instruction clearly defined sexual harassment, using a definition that took into account both parties' proposals. Plaintiff argues that the Court's response to the first question may have confused the jurors in that it somehow contradicted what Plaintiff perceived to be as the Court's judicial notice that it is obvious that the relationship between a husband and wife is inherently sexual. As stated the Court's comment was not judicial notice and it was not an instruction; further it did not contradict the answer

to the question about how to answer the question of whether Mr. Harrison's conduct was sexual in nature or because of gender. If it were an "automatic yes," the question would never have been presented to the jury. It is for the jury to decide unresolved questions of fact. Plaintiff's arguments about jury confusion lack merit. Further, if Plaintiff is trying to argue that this alleged juror confusion should result in a new trial, she is mistaken. Plaintiff has not met her burden of showing a manifest error of law or fact occurred.

FN6. Judge Kessler presided over answering these two questions.

*5 Plaintiff's final argument on this issue is that the Court erred in not giving her proposed instruction to the jury that provided the criminal definition of stalking and explained it was a form of sexual harassment. Plaintiff argues that if the jury had realized the local criminal statute regarding stalking incorporates harassment as part of its definition, they would have understood that when Plaintiff filed a stalking complaint with the police she necessarily incorporated harassment in her complaint. Plaintiff's argument is not convincing. First, the jury was instructed as part of the instruction defining sexual harassment that "stalking may constitute sexual harassment." This part of the instruction served the same purpose as Plaintiff's requested instruction-it notified the jurors that stalking is a form of harassment. As Defendants point out, there was no need for the criminal code definition of stalking as it would have confused the jury and was unnecessary. Omitting

the specific instruction sought by Plaintiff was not a manifest error of law that would justify granting her Rule 59 motion.

Because Plaintiff's arguments are unconvincing and Plaintiff has not made a showing that the jury verdict was not reasonably supported by the evidence at trial, the Court denies her Rule 50(b) motion for a judgment as a matter of law on her sexual harassment/hostile work environment claims. Nor has Plaintiff met the standard for a new trial under Rule 59, in that she has not shown a manifest error of law or fact, or for relief from judgment under Rule 60(b)(3) because Plaintiff did not prove with clear and convincing evidence that Defendants engaged in fraud, misrepresentation or other misconduct.

B. Plaintiff's Renewed Motion For Judgment on Her Retaliation Claims

In Plaintiff's second post-trial motion, Plaintiff's Renewed Motion for Judgment on Her Retaliation Claim, Pursuant to Rule 50(B), or in the Alternative, for a New Trial, Pursuant to Rules 59 and 60 ("Plaintiff's Renewed Motion re Retaliation"), Plaintiff asks the Court to enter a judgment on her retaliation claims, notwithstanding the jury verdict, as a matter of law, or, in the alternative to grant her request for a new trial or provide her with relief from the judgment due to alleged fraud.

Plaintiff's arguments in this motion border on the frivolous. None of her arguments really support her Rule 50(b) motion. Plaintiff essentially tries to

rehash issues and arguments concerning the scope of her retaliation claims that were already decided on summary judgment. Magistrate Judge Facciola's Report and Recommendation in this case, which was adopted by this Court, narrowed the scope of Plaintiff's retaliation claims. Plaintiff moved for reconsideration on this issue in one form or the other at least *six* times and had enough chances to argue this issue. The purpose of a Rule 50(b) motion is not to rehash decisions that were made pre-trial, but to determine whether the jury verdict was supported by the evidence presented at trial. Plaintiff does her motion little justice by spending pages and pages trying to reargue issues that were decided before the trial began, rather than discussing the evidence presented at trial.[FN7] Plaintiff also attempts to argue that the jury was not properly instructed on what constitutes an adverse action under the D.C. Circuit's retaliation case law; however, the jury instruction on retaliation did reflect the recent clarification in the D.C. Circuit's definition of an adverse action, embodied in the *Rochon* case. *See* Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C.Cir.2006).

FN7. Indeed Plaintiff filed a thirteen-page supplement citing a new Federal Circuit case in support of reinstating her previously dismissed retaliation claims.

***6** The Court can only construe these arguments to support Plaintiff's Rule 59 motion for a new trial. Under the standard for granting such a motion, Plaintiff must show a manifest error of law or fact. The Court cannot find that disallowing certain of

Plaintiff's original retaliation claims was such an error. Plaintiff's contention about the retaliation jury instructions is wrong and as such cannot be the basis for granting a motion for a new trial.

Plaintiff's only other discernible argument in support for her Rule 50(b) motion for judgment as a matter of law is that even if the jury had sufficient evidence to reasonably determine that Mr. Harrison's conduct was not sexual in nature or based on her gender, as the Court has just found it did, that the jury still should have found Plaintiff engaged in protected activity by reporting the harassment that she perceived was based on her sex. Plaintiff did testify at trial that she perceived Mr. Harrison's conduct to be sexual in nature and because of her sex; however, it was not unreasonable for the jury to find that she did not engage in protected activity in complaining about Mr. Harrison to the Dean's office. Aside from testimonial evidence, the jury also had a great deal of documentary evidence that documented Plaintiff's complaints to the Dean's office. Based on the documentary evidence, there was sufficient evidence for the jury to reasonably find that Plaintiff did not engage in a protected activity because, for example, Plaintiff phrased some of her complaints as security issues.[FN8] Plaintiff does not meet her burden of showing under Rule 50(b) that the evidence was so one-sided that a reasonable jury could have only reached one conclusion on the protected activity issue.

FN8. While there are no "magic words" that need to be said to invoke Title VII protection, *see Martin v. Howard University,* 1999 U.S. Dist. Lexis19516 at *17, it was up to the jury to determine whether Plaintiff's communications with the Dean's office constituted protected activity.

Plaintiff goes on to argue that had the jury found she had engaged in a protected activity, it would have then gone on to find that Defendants' reasons for not giving Plaintiff the tenure-track position she sought were pretextual and false. This is an extremely tenuous and speculative argument. Further, Plaintiff never addresses the fact that in addition to finding no protected activity, the jury also found that Defendants had not intentionally retaliated against Plaintiff. To reach whether or not Defendant's alleged non-discriminatory reasons for not selecting Plaintiff were pretextual, the jury would first have had to have found that Defendants intentionally retaliated against her and that her alleged protected activity contributed in some way to the decision not to select Plaintiff for the tenure-track position. Plaintiff does not argue that this jury finding that there was no causal connection between her alleged protected activity and her non-selection was not supported by the evidence presented at trial. Instead, Plaintiff jumps to whether Defendants' reasons for not giving her the tenure-track position were pretextual. In any event, the evidence presented on the issue of whether Defendants' reasons for not selecting Plaintiff were pretextual was not so one-sided as to only result in one conclusion. Further, as Defendants point out, there was sufficient evidence for the jury to

reasonably find that Plaintiff was not selected for the tenure-track position for legitimate reasons and this decision was not taken because of Plaintiff's alleged protected activity. In their opposition, Defendants correctly point to a great deal of testimonial evidence from the members of the APT Committee to support the jury's finding that Defendants did not retaliate against her, i.e., that they did not select someone other than Plaintiff for the tenure-track position because of Plaintiff's alleged protected activity.

*7 As to her second retaliation claim based on Dean Newsom's letter asking her to vacate her office, Plaintiff only addresses it substantively in her reply brief. She argues that the verdict form should have clearly stated the language from *Rochon* and *Burlington;* however this was unnecessary as the jury instructions did include such language in defining an adverse action. Plaintiff's argument is disingenuous and misleading. Plaintiff also argues Defendants were on notice of her EEOC charge, her protected activity, at the time of the alleged retaliation, but the resolution of this question is unnecessary at this time as there was sufficient evidence from which the jury reasonably found that the early eviction notice was not an adverse action, and thus did not have to reach the question of notice.

Because Plaintiff has not made a showing that the jury verdict concerning her retaliation claims was not reasonably supported by the evidence at trial, the Court denies her Rule 50(b) motion for judgment

as a matter of law on her retaliation claims. Plaintiff has also not shown any manifest error of law or fact for a new trial under Rule 59, or shown with clear and convincing evidence that Defendants engaged in fraud, misrepresentation or other misconduct under Rule 60(b)(3).

C. Plaintiff's Renewed Motion for Judgment on Her Contract Claim

In Plaintiff's third post-trial motion, Plaintiff's Renewed Motion for Judgment on Her Contract Claim, Pursuant to Rule 50(B), or in the Alternative, for a New Trial, Pursuant to Rules 59 and 60 ("Plaintiff's Renewed Motion re Contract Claim"), Plaintiff asks the Court to enter a judgment on her contract claim, notwithstanding the jury verdict, as a matter of law, or, in the alternative to grant her request for a new trial or provide her with relief from the judgment due to alleged fraud.

Plaintiff wastes time discussing issues that the jury did not even reach. The only finding the jury made as to this claim was that Defendants, specifically Professor Taslitz, did not promise Plaintiff that her employment with the university would continue past her two-year agreement; the jury did not need to go beyond this question. As to this finding, Plaintiff argues there was evidence presented at trial, including her testimony and documentary evidence, that shows no one from the university told her that she was not guaranteed to stay on more than the two years in her written agreement, indicative of a meeting of minds and

that a promise as such was made. This unconvincing argument takes a large logical leap. Further, most of the evidence Plaintiff points to is in the context of pretrial discovery, not what actually was presented at trial. Further, the jury did have enough trial evidence to reasonably find, as they did, that no such promise was made-they heard testimony from Professor Taslitz, they saw documentary evidence of communications between Plaintiff and Professor Taslitz and they heard testimony from Professor Leggett, the then-head of the APT Committee, that Professor Taslitz did not make the alleged promise to Plaintiff. The jury had a sufficient basis to reasonably find that Plaintiff had not shown by a preponderance of the evidence that such a promise was made. The Court cannot find the evidence presented at trial was so one-sided that a reasonable jury could only find that such a promise was made.

*8 Plaintiff also argues that Defendants made misrepresentations to, among other things, hurt Plaintiff's credibility. This argument lacks merit.[FN9] Finally, Plaintiff argues that certain pieces of evidence that were ruled inadmissible before the trial should have been admitted and that their exclusion prejudiced Plaintiff. Plaintiff does not show how these exhibits would bolster her contract claim or cut against the jury's finding that no promise was made to Plaintiff about extending her employment past the two-year agreement. Any connection between these exhibits, including student letters protesting her non-renewal and a treatise crediting her contribution, and the question

of whether Plaintiff was promised an extension in the form of a renewed visitorship or a tenure-track position is extremely speculative and remote. Plaintiff has not carried her burden in her Rule 50(b) motion of showing the jury verdict was not supported by the evidence presented at trial.

FN9. Plaintiff also incorporates her motion for additional time to complete the trial. It is surprising that Plaintiff would raise such motion at this time. At the outset of trial, each side was allotted twenty-five hours each; only each side's direct, cross, and redirect examinations would count against them, their opponent's cross-examination time of their witness did not count. Plaintiff received extra time despite several warnings that she was running out of time. This trial lasted three and a half weeks; Plaintiff had plenty of time to present her evidence and rebut Defendants' evidence. This argument cannot support her motion for a new trial.

Assuming Plaintiff points to these evidentiary issues in support of her motion for a new trial, the Court does not find that the evidentiary rulings Plaintiff cites were manifest errors of law. Plaintiff also argues that the instruction given to the jury concerning Plaintiff's two changes in counsel and decision to represent herself was somehow prejudicial. In fact the instruction was meant to ensure that the jury would understand the two changes made and not hold them against Plaintiff. The instruction was not a manifest error of law and the Court does find that denying Plaintiff's motion for a new trial would result in a miscarriage of justice.

Because Plaintiff has not made a showing that the jury verdict concerning her contract claim was not reasonably supported by the evidence at trial, the Court denies her Rule 50(b) motion for judgment as a matter of law on her contract claim. Plaintiff has also not shown any manifest error of law or fact for a new trial under Rule 59, or shown with clear and convincing evidence that Defendants engaged in fraud, misrepresentation or other misconduct under Rule 60(b)(3).

IV. Defendants' Post-Trial Motions

Because the jury found for the Defendants on all three claims, and the judgment was entered on August 21, 2006, after Defendants filed their post-trial motions, the Court finds Defendants' motions are moot.

V. Conclusion

For the reasons stated above, the Court denies Plaintiff's renewed motions for judgment as a matter of law on each of her three claims, Plaintiff's Rule 59 motion for a new trial, and Plaintiff's Rule 60(b)(3) motions. The Court also denies Defendants' renewed motions for judgment as a matter of law on each claim as moot. An appropriate order accompanies this memorandum opinion.

D.D.C.,2006.
Martin v. Howard University

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN,

Plaintiff,

v.

HOWARD UNIVERSITY, et al,
Defendants.

No. 99-1175
(TFH)
January 3,
2007

ORDER

Plaintiff timely filed an Opposition to Defendant's Bill of Costs on November 9, 2006. [dkt. 510] Though styled correctly as an Opposition to Bill of Costs, the arguments presented appear more appropriate for a Motion to Retax pursuant to Local Rule 54.1(e) ("LCvR"). Accordingly, the Court will reserve judgment on the arguments presented in Plaintiff's November 9, 2006 Opposition until after the Clerk taxes costs following appeal. At such time, Plaintiff will have an opportunity to present argument(s) in a Motion to Retax.

For the reasons stated above, Plaintiff is hereby **GRANTED** an additional ten days to file an

appropriate Opposition to Defendant's Bill of Costs in conformity with LCvR 54.1(b). Should Plaintiff choose to file such Opposition, it shall specifically identify each item objected to and the grounds for the objection, as directed by LCvR 54.1(b).

January 3, 2007

/s/

Thomas F. Hogan

Chief Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN,

Plaintiff,

v.

HOWARD UNIVERSITY, et al.,

No. 99-1175 (TFH)

January 23, 2007

ORDER

On January 15, 2007, Plaintiff filed a Motion for Reconsideration and/or Clarification of the Court's January 3, 2007, Order. [dkt. 515]. The Court's January 3, 2007, Order granted Plaintiff an additional ten days to file an Opposition to Defendant's Bill of Costs. [dkt. 514]. The Court's January 3, 2007, Order neither foreclosed Plaintiff from making argument nor required Plaintiff to file a new Opposition. Rather, the Court – believing Plaintiff misapprehended the operation of Local Rule 54.1 ("LCvR") – provided an opportunity for Plaintiff to make additional arguments in conformity with LCvR 54.1(b), if Plaintiff so chose.[8]

[8] The Court stated: "[s]hould Plaintiff choose to file such Opposition, it shall specifically identify each item objected to and the grounds for the objection." [dkt. 515]

To clarify, pursuant to LCvR 54. 1, the Clerk taxes costs after the Court of Appeals issues its mandate.[9] At such time, the Clerk considers the Bill of Costs together with the Opposition thereto. After the Clerk taxes costs, the party against whom costs are taxed has an opportunity to seek redress from the Court *via* a Motion to Retax. LCvR 54.1(e). In the instant action, the Court of Appeals has not issued its mandate, and accordingly the Clerk has not yet taxed costs.

If Plaintiff wishes the November 9, 2006, Opposition to Defendant's Bill of Costs [dkt. 510] to stand as the Opposition, Plaintiff need not file an additional Opposition. If, on the other hand, Plaintiff wishes to take advantage of the Court's January 3, 2007, Order and file an Opposition that specifically identifies each item objected to and the reasons therefore, consistent with LCvR 54. 1, Plaintiff shall do so by Wednesday, January 31, 2007. In either event, the Clerk will not consider the Bill of Costs or the Opposition thereto until after the Court of Appeals issues its mandate, consistent with Local Rule 54.1(c).

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[9]Plaintiff appears to believe costs are taxed prior to the completion of the appellate process. Pl.'s Mot. Reconsideration, p. 3 ("Plaintiff should certainly not be forced to pay improperly taxed costs now and then ask the Court to make Howard give it back, perhaps a year or more from now, after the appellate process is complete"). Local Rule 54.1(c) makes clear that this is inaccurate.

Accordingly, Plaintiff's motion for reconsideration is hereby **DENIED,** and having clarified the Court's January 3, 2007, Order, Plaintiff's motion for clarification is hereby **DENIED** as moot.

SO ORDERED.

January 23, 2007

/s/
Thomas F. Hogan
Chief Judge

November 25, 1997

TO: Dean Alice Gresham Bullock

FROM: Dawn V. Martin

RE: Security Problem on Campus

This memorandum is written to supplement information which I presume that you have already received, from Associate Dean Newsom and/or Howard University Police, regarding two letters which I received under my office door and two voice-mail messages which I received on my direct office telephone line. The sender of both the letters and messages has identified himself *as* Leonard Harrison, a homeless writer who is informally studying Black American history and American law. Most importantly, he thinks that I am his long-lost wife.

When I entered my office on the morning of Thursday, November 20, 1997, two letters had been slipped under my door (copies attached). The first was addressed to "Professor Dawn Valore Martin."[1] This letter begins:

1"This was unusual in that I generally use my middle initial and no one has ever guessed my middle name, since it was "made up" by my grandfather. It is sometimes mispronounced *as* "Valerie," but people who know my full name also know that I am very particular about the correct pronunciation.

> I am here to see it you are my wife. This sounds irrational and unreasonable, I know, but I have been searching for my wife for the last 9 years, since I saw her at the U, of low on March 5, 1998.[2] You may not be who I am looking for. If not, please don't hate me, because I desperately need her. I have no other help anywaywhere. I will return Thurs. at 1p.m.

The letter continues by giving the address and phone number of the Randell Shelter in Southwest, asking me to call him to let him know either way whether I am his wife.

The second letter is a request to audit my "Race *as* Factor in American Law class." The problem is that I do not teach this course at Howard. I taught this class only once, in the spring of 1995, at Cleveland State University.[3] "Leonard" discusses critical race theory and African- American history writing, some of which I have read. He writes very well and has clearly read and thought about the works of which

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2I have never set foot in the state of Iowa.

3This course, which I created, differs from the typical "Race and the Law" class in that it is not a civil rights course, but rather, a survey of various areas of the law, including criminal, torts, family law, immigration, education, and others, in which race *as a* factor in judicial decisions and legislation. I was struck by the fact that "Leonard" had the exact title correct, indicating more that he had read it somewhere rather than heard it.

he speaks. It was at this point that I realized that Leonard 'was the same person who had called and left me a voicemail message a week or two earlier, making the same request. He did not leave a return phone number, but said that he would call back. I had not thought much of it at the time and simply erased the message. If he had called back and reached me, I would simply have explained that I do not teach that course at Howard and ask him where he had heard that I teach it.

After reading these letters, I checked my voice-mail messages, *as* I usually do upon entering my office. A male caller (whose voice I did not recognize) left the following message at 9:23 am., on Wednesday, November 19th:

> How're you doin', Valerie. This is Leonard. I'm sorry I didn't recognize you. I have no excuse for recognizing you. All I can do is ask you to please forgive me and give me a chance to make it up to you. I'm coming up to the school today. I hope I can catch you there so that I can apologize to you in person. You're the most important person to me, so please forgive me.

I think that I could have handled the letter, since he did say that he recognized that he sounded irrational and that I might not be the person that he was

looking for; however, to leave this phone message on an answering machine which clearly states that it is the voice mail of Professor Dawn Martin, left me totally stunned. Naturally, I wanted to know: 1) where he had seen me; 2) how long he'd been watching me; 3) how he found out my middle name (despite the mispronunciation); 4) why he chose to call me by what he either thought was my middle name, or by some name other than my own; 5) how he knew about a course which I taught in Cleveland and why he thought that I teach it here; 6) whether he was "confused" and harmless or confused and dangerous; 7) whether he had any history of violence; and 8) what his intentions were toward me. More importantly, I realized that since he had clearly been outside my office door in order to place the letters under it, a man who had apparently "read up" on me would not *miss* the opportunity to read the bulletin board outside my office. I had posted an article written by my daughter, Danielle, regarding changing the name of her school. If Leonard read that bulletin board, *as* I believe he did, he now knows my baby's name, her age, where she goes to school, and most of her after-school activities, including cheerleading, which would make her very easy to find at a game -- particularly since she looks so much like me and her name is printed on her cheerleading jacket.

I did not want to overreact, but I did not want to be foolish either. I wanted to meet Leonard to get answers to these questions and to politely assure him that I am not his wife; however, I did not want to meet this man alone -- just in case he did not take

the news well. I had to teach Evidence at 12:00, but after class, I looked for security, since I did not want to be in my office alone at 1:00, when Leonard promised to return.4 I could not find security. I did meet some colleagues in the cafeteria and showed them the letters. They advised me to call MPD immediately. I then went to your office, but you were out of town, so I went to see Dean Newsom. As I am sure he has already informed you, he told me to use my own judgment, but he advised me to call MPD. I told him that I did not believe that I should call MPD on Howard's campus without the involvement of Howard's administration. He told me to keep him informed. Dean Newsom also advised me not to take the elevator, but rather, the stairs. I told Dean Newsom that I had no intention of sitting in my office alone.

I decided to call the shelter to get some information on Leonard. Assistant Director Russell Farlow informed me that Leonard was listed *as a* resident, but that neither he nor his staff members could place the name with a face. He asked me to call back after 8:00 p.m., since residents were not allowed in until 7:00.

4My posted office hours are 1:00-3:00 Monday, Tuesday, Thursday, and Friday. I am sure that he chose 1:00 based on reading my office hours -- giving more corroboration to my concern that he had read my bulletin board and learned information about Danielle.

I had to leave for a doctor's appointment,[5] so I could not call MPD at that time. I had left a message for a friend who is a former MPD officer, so that I could the name of a contact person at MPD and not have to call "cold" on my own. I did not want to be dismissed as an "hysterical female." Shortly before I left, Dean Newsom asked me whether I had made "that call," stressing the importance of doing so. I explained that I had left the message and was about to leave.

That night, I called the shelter to speak to Leonard. I believed that Leonard might be more inclined to answer my questions than he would MPD's. I did not want to have a harmless persons arrested or put out of his only home; nor did I want to anger him by being responsible for having him arrested or put out of his home. If he intended me no harm, why cause him to want to harm me? The truth is that even if he were arrested, he would probably not be held long. I did not want him angry and looking for me -- or worse yet, my daughter.

After staff member, Mr. Smith, told me that Leonard had been at the shelter that night, but had been put out for carrying a stick. Smith said, "You can't keep a stick in here. He's crazy, He's dangerous." He told

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[5]I am still addressing injuries from my car accident last year. In addition to pain in my back and neck injuries, my right arm has been going numb without warning. I would have had to wait two weeks for another therapy appointment and have paid for the missed appointment.

me that I should say a "special prayer." I asked for a description of Leonard. Smith said that he was almost six feet tall, dark-skinned, and thin. Smith said that he wears a red rag on his head, dark glasses, and carries his bags and a stick.

I called Officer Serleaf, the law school's security officer. I asked him to call to set up a meeting with MPD in the morning. When I arrived at school, I again stated that I would not sit in my office alone I asked whether someone could be in my office with me during office hours. Officer Serleaf said that the University did not have the manpower to do this. Shortly after MPD arrived, I called Dean Newsom. He attended part of the meeting. MPD made out a stalking report and Officer Woodland, of the Second District, 282-0043, said that the report would be submitted for an arrest warrant for stalking. She wanted me to commit to prosecuting if they investigated.[6] I expressed some concerns about

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[6]This was after being subjected to answering questions about ex-husbands and friends in high school. I was clear that I had never misplaced any ex-husbands.

committing to prosecuting before MPD ionvestigated, and even asked the language of the stalking law, but Officer Woodland did not know it. Faced with either no investigation or committing to prosecuting (albeit, possibly prematurely), I committed to prosecuting.' I also realized and discussed with Officer Woodland that if the facts uncovered did not meet the statutory definition of stalking, the U.S. Attorney would not prosecute anyway. I again expressed concern that Leonard might retaliate if police intervened and then let him go.

The officers went to the library to check for Leonard. I had told them that based on his letters, I firmly believed that he was doing his "research" right in out library. I determined that it had to be through his visits to the library that he first saw me. I went to teach my class. A few hours later, on my way out (I held office hours in the cafeteria), Officer Serleaf stopped me and took me into his office. He assured me that I had done the right thing by calling MPD. He said that he understood my concern over retaliation, especially since I live alone with my daughter. He also told me that before the MPD officers left, they learned that Leonard had a record for "armed robbery." Officer Serleaf was not sure whether there was anything else in his criminal record. Officer Serleaf expressed great concern for my

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7 Dean Newsom advised me to commit to prosecuting, for the protection of others on campus as well *as* for my own protection.

safety and said that he was writing a full report, recommending that main campus send a guard ato sit with me during office hours.

When I arrived home, I called MPD to be clear on Leonard's criminal record. Officer Woodland and her partner, Officer Harris, were gone for the day. After some difficulty, I reached a desk sergeant, Sgt. Pearfall, who looked at the file for the first time at my request. She told me that she saw a 1995 assault in his record. Skimming the file, she said, "He's crazy." She told me that I should be very concerned. She told me that she would call the shelter for more information and asked that I call her bad. Unfortunately, I went out shortly thereafter, and when I returned, she was off-duty. The case was to be assigned to a detective the next morning, so I decided to wait for the detective's call. No one called over the weekend.

When I returned to school yesterday, Officer Serleaf was on vacation and a female officer was in his place. She knew nothing about Officer Serleaf s report or the incidents involving Leonard.

One of my students, Rolanda Jefferson, works in the library. Today, she saw Leonard there -- fitting the description given by Smith, but without the sunglasses or the bags. He was wearing a red jacket and black pants. He also had facial hair. Ms. Jefferson immediately called security, reportedly

informing them that there was a homeless man in the library who had been stalking her professor. When the security officer, Officer Dowdy, arrived and led Leonard away from the library, she called security again and stressed to her supervisor, Adrian White, that Leonard should be detained because there was both a campus security report and an MPD report on him. Officer Dowdy returned alone, having *escorted Leonard off campus.* Officer Dowdy later told me that he knew nothing of the problems with Leonard and had only been given the report that there was a homeless man in the library. Officer Dowdy said that he told Leonard that he was not authorized to use the library and would have to leave. He reportedly showed Officer Dowdy a Texas driver's liscence bearing the name Leonard Harrison. He also reportedly told Officer Dowdy that he *is* from New York.

Officer James Andrews replaced Officer Dowdy on the night shift and informed him of the days' events. Officer Andrews called MPD and learned that the case had been assigned to Detective Henry of the Second District, 282-0043. Det. Henry had left for the day, but Officer Andrews promised to call him in the morning.

Clearly, the lines of communication with respect to security need improvement. The truth is, that if "Leonard" wanted to hurt me, I would be hurt by now. The reports taken would only serve to solve my murder after the fact, since clearly, no effort has been made to protect me. It is a good thing that I believe that my personal safety rests with God, because if I believed that it depended on campus

security and MPD, I could not make myself come to work. Clearly, some better security procedures need to be put in place for the protection of faculty, students and guests; otherwise, there is no point in having campus police at all.

cc: Dean Michael D. Newsom

December 2, 1997

TO: Dean Alice Gresham Bullock
FROM: Dawn V. Martin
Visiting Associate Professor of Law
Re: Update on Security Problem

Yesterday morning, I arrived at work at approximately 11:30. a.m. I played my voice mail messages and obtained the following message, delivered 9:37 a.m., Monday, December 1st:

> Valerie, this is Leonard. I'm coming to up the school. I will up there about 1;30, quarter of 2. I'm at the Library of Congress. I'll be leaving out of here about 11:00. Do me a favor, call security off me, so when I come on campus, I'm not gonna have (inaudible word or two) seeing a suspicious looking person and then have security in my face. I'll see you in a little bit. Byebye.[1]

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[1]I later noticed that my previous messages, which I had saved, had been erased. One of the two saved messages was the a previous message from "Leonard," quoted in my November 25, 1997 memorandum to you. I have no idea how or why someone went into my voice mail and erased my messages. Several colleagues, Dean Newsom, and security personnel did hear the earlier message, but I had wanted to save it for voice identification, if necessary. I had asked Officer Serleaf on the day the message was left whether security could copy it onto another tape, but he said that security did not have such equipment.

As you know, I immediately went to your office and reported this to you. You let me know that you had written a memorandum in response to my November 25th memorandum, but I have not yet received it. At your direction, Barbara Smith made arrangements for a security officer to sit with me in my office after class. You also asked her to post the officer outside my classroom at 12:15.

Officer Dowdy, sent from main campus, did arrive outside of my classroom sometime between 12:30 and 12:45. Officer Dowdy is the same Officer who escorted Leonard off of campus. Officer Dowdy sat in my office after class, and as promised, "Leonard" arrived at approximately 1:40, while a student was in my office. This was the first time that I had ever seen Leonard, and I saw him only for a second; however, he fit the previously given description perfectly -- except that he looked at least six feet tall to me, his glasses were not dark, but thick, and he did not carry any bags or a stick. Leonard looked as if he were going to enter my office, glanced in, saw officer Dowdy, then immediately turned and quickly left. I nodded to Officer Dowdy and said, "There he is." Officer Dowdy immediately ran out of the office after him.

I heard nothing from anyone for at least the next hour. I stayed in Prof. Nolan's office most of that time, since I did not know whether Leonard had been "caught." I finally left a note on my door that I would be in the cafeteria or in the security office, and proceeded to security. The officer on duty knew nothing about the matter. Officer Dowdy soon showed up, sweating and out of breath. He told us that he had chased Leonard out of the building, off campus, up Van Ness and into the woods.

HOWARD UNIVERSITY

December 1, 1999

SCHOOL OF LAW
OFFICE OF THE DEAN

MEMORANDUM

TO: Professor Dawn Martin

FROM: Alice Gresham Bullock /s/

RE: A Security Problem on the Campus

I am in receipt of your November 25, 1997 memorandum, regarding a security problem on campus. I am discussing the matter of security generally with Mr. Dawson, Director of Security.

AGB:mt

Copy: Chief Lawrence S. Dawson

P.S. Please call the security officer on main campus and the metropolitan police immediately when concerned in the future.

2900 Van Ness Street, NW (202) 806-8000
Washington, DC 20008 FAX (202) 806-8424

December 18, 1997

TO: Michael Dehaven Newsom

FROM: Dawn V. Martin
Visiting Associate Professor

RE: Security Problem on Campus: Leonard Harrison

This memorandum is written in response to our conversation today. You asked me for an update on the "stalker" situation, as outlined in my previous memoranda, beginning with my memorandum to Dean Bullock on November 25, 1997. As I explained, I have not heard anything from Leonard Harrison since he was chased from my office, off campus, "down" Van Ness, and into the woods by Officer Dowdy on December 1, 1997.

As I explained, however, since his telephone message that morning indicated that he was upset that I had called security about him, and because he was chased off campus and MPD has visited the shelter about him, I do not expect that he will announce his arrival anymore. He certainly realizes now that if he does, security will be waiting for him; therefore, it is not clear whether he has stopped stalking, or simply stopped announcing his visits. Since classes have ended and my hours on campus have varied, he can no longer rely on my posted office hours to determine when I will be here.

You asked me today what I thought should be done. Like you, I am not an expert in security matters; however, it is clear to me that **at minimum**, a notice should be posted in both the security office and the

library so that if Leonard is seen on campus, security should be notified. Since Leonard has a criminal record, MPD has a photograph of him, which should be requested and posted. I also believe that all faculty and staff should be notified of the facts, as outlined in my previous memoranda, and given a description, if not a photo, of "Leonard." Certainly, when Leonard did announce his arrival, **at minimum,** the guard at the desk should have been informed of the problem when main campus had sent Officer Dowdy to sit with me in my office anticipating Leonard's arrival. Certainly Leonard should not have been able to walk into this building at his announced time, come up to my office on the third floor, then run out of the building, off campus and down Van Ness, with Officer Dowdy chasing him, **without being noticed by any other security officer.** I have been carrying **mace** on my key chain since this incident. I am not a paranoid person, but I do not feel at all protected by campus security.

They apparently need to be told that the law school administration is taking this matter seriously wants some action taken. This "stalking" situation could happen to anyone. Why "Leonard" chose me to be his "long lost wife" is a complete mystery to me; however, where the campus and library opens its doors to everyone, faculty, staff and students are exposed to anyone who chooses to walk into either of the buildings. Since our names are posted on our office doors and some biographical information is listed in the AALS directory, available on campus, it was probably easy for "Leonard" to learn information like my middle name and that I taught a class in "Race as a Factor in American Law," although not at Howard

(which he did not realize, and requested to audit this class).

You asked me to write up the notice which should be posted. Frankly, I think that all law school personnel should be notified of all of the events which have occurred, and that it should have been discussed in at least one of the faculty meetings which we have had since the first incident on November 20th, 1997; however, the content and wording of such a notice is within the authority and discretion of the administration. Since you have asked me to write a description of Leonard to be posted, I have done so on the attached page, including the absolute **minimum** information which I believe should be posted.

cc: Dean Alice Gresham Bullock

Security Notice!

Notify Campus Security and /or the Metropolitan Police Department Immediately if you see the following person!

Leonard Harrison: African-American male, approximately 6 feet tall and thin; dark complexioned, thin facial features, glasses (dark or clear); age 40, "salt and pepper hair color. Often wears a red handkerchief tied on his head; may be carrying bags and/or a stick.

A stalking complaint has been filed against this subject and he has been barred from campus. MPD wants him for questioning regarding the stalking complaint. The MPD Detective assigned to this case is Det. Brian

Henry, of the Second District, 282-0043.
Campus Security should Rat release Leonard Harrison without consulting with MPD and main campus security.

TMCA
Torkin Maines Cohen and Arbus
Barristers and Solicitors
151 Yonge Street, Suite 1500
Toronto, Ontario M5C 2W7
Tel: 416-863-1188
Fax: 416-863-0305
Dauna I. Groskaufmanis
Direct: (416) 777-5421
dgroskaufmanis@torkin.com

Associated worldwide with ACL international
Larry A. Torkin, Retired from firm
FACSIMILE
Please deliver immediately
To: Professor Martin
Firm: Howard University
From: Daina I. Groskaufmanis
Fax: (202) 806-8428
Telephone: (202) 806-8136
Date: January 12, 1998
Re:
File No. 9999 1 User No: 244
Total Pages Sent (including this cover sheet): 11

Message: Thank you for speaking with me. I will pass on your comments to Valerie.

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CONTACT DAINA GROSKAUFMANIS AT (416) 863-1188. This telecopy is privileged and may contain confidential information intended only for the person[s] named above. Any other distribution, copying or disclosure is strictly prohibited. If you

received this telecopy in error, please notify us immediately by telephone and return the original to us by mail without making a copy.

Leonard Harrison
1401 Virginia Ave., N.W.
Washington, D.C. 20037

Valerie A. Edwards
Torkin, Manes, Cohen and ARbus
151 Yonge Street Suite 1500
Toronto, Ontario M5C 2W7
Canada

12/29/97

Dear Valerie:

The following represents an adaption of a "statement" I was advised to prepare in defense of a "stalking" charge allegedly pressed against me by one of the professors at Howard University law school. As a consequence, its contents embody the line of reasoning for this presentation to you. As it occurred, no charge was in fact leveled against me, rendering counsel void. Conclusively, I am passing the circumstances onto you evaluation and possible resolve. My belief in this possibility comes to light as I gained impression with your interpretation of the issues concerning the entire legal community and the proposed "creative problem-solving" assessment and resolution of that particular equation. You remind me of a fictional character named "Geneva Crenshaw."

Initially, my purpose here is to apologize to professor Dawn Valore Martin. It was not my

intention to "stalk" or otherwise intimidate her in any fashion, shape or form. This experience was based on a misidentification and nothing more.

Over the past several years, I have been attempting to discover the identity of a woman I had seen at the University of Iowa law school. This person gave me reason to believe that she is my natural wife. At present, however, I am aware that she was once the wife of a man named Valdemar Edwards. I had met both Valdemar and his wife, Valerie, at a "home" for children called Lakeside School, which is in Spring Valley, N.Y. Valdemar at work at a "house parent" in the "unit" or "cottage" were I lived as a student at the school.

As events will occur, however, I had not recognize the woman in the lobby of the law school as Valerie Edwards definitively; and so since have been, in effect, cast at sea (as Ishmael) upon an awesome voyage and quest, including what could be perceived as monsters and trials and tests allegedly found only in literature, myths and fairy tales. Perhaps the mythical god Poseidon grew angry with both Valerie and meet, -- -- Valdemar being a mythical son of Neptune; and, as a consequence, it became necessary for me to prove my superior worth over and above Valdemar through unbelievable trials and tests, and even confrontations with monsters, found allegedly only in allegory. This is obviously conjecture, but a certain reality exists here within the facts. Whether that reality is true or not I am not qualified to say, but I believe that you, Valerie Edwards, are. Thus I issue this essay to you with confidence. for with respect to my critical examination within the field of jurisprudence and its related areas, I have found the

article "stress and the Practice of Law" to be the reflection of a profound intellect and of wise counsel comparable with the premeditation's of the main character, "Geneva Crenshaw," in the book entitled And We Are Not Saved, by Derrick Bell. With regard to Valdemar, and measuring Valerie Edwards as Geneva Crenshaw, it appears that Valerie believed that with her help, I would have the potential to walk as the savior on earth and in fact "save" the black American masses from destruction and doom. This is very large commentary here and I applause in reflection.

Nevertheless, and in spite of this, there are a couple of simple reasons responsible for the initiation of the awesome journey toward the discovery of my natural wife. According to my memory, the Valerie Edwards I had known in the pass was not as tall nor as heavy as the woman at the law school; and as far as I was concerned, Valerie Edwards was happily married to Valdemar N.Y.C. verily, it appeared that this Valerie Edwards look-unlike was actually a taller, more youthful, prettier and (forgive me for saying) more voluptuous woman in the Valerie Edwards whom I had met and had known at Lakeside.

As it were, it was a cold winter evening that a black American law professor from Harvard University had come to the University of Iowa to deliver a lecture on its recently published book entitled And We Are Not Saved. I had not known of the lecture and so did not attend it I was simply on my way to the law library to gain access into the field of jurisprudence, which was a new line of study for me. On March 5, 1998, therefore at

approximately 9 pm, I entered the lobby of the law school at the University of Iowa. There was a group of 25 to 30 individuals and the lobby enjoying refreshments and discussing the contents of the lecture. The lecturer, Derrick Bell, was sitting at a table signing copies of his book, and as I entered the front door, I paused. It was unusual to observe a congregation of black Americans in the lobby of the law school, as black Americans comprised less than 1% of the student body. I paused, therefore to observe the unusual happening.

I recognized the majority of the people present, as most of them were either students, professors were administrators at the university. Just before me, however said a woman of uncommon physical characteristics. Wearing high heels -- -- Valerie Edwards normally did not wear -- -- she stood about 6'4" tall. She wore her long, straight, jet black hair in a bun. Her features were severe and of far Eastern Indian descent, describing extremely pronounced eyebrows and extravagant eyelashes, deep and richly black; her nose described off of shape at its bridge with a sharp, long shaft that reminded me of the character "Pinocchio" on a humorous level and as an owl on a more serious level. The truth is, I had never looked Valerie Edwards full in the face, on account of painful bashfulness -- -- while enamored by her person and both distracted and infatuated with her legs -- -- and so was not aware of her exact facial features. At the time of my entrance into the lobby of the law school, the woman described above responded in a manner that calls me to believe her to be my natural wife. This response put me at ease, making me feel at home. She also appeared to feel

quite comfortable and at home in the environment. And because she was conversational and social with a law students and law professors in particular, I was convinced that she was active, professionally, in the field of law.

Since I had not attended the lecture, I did not attempt to join in the discussions and only paused briefly to be for and then moved on. I was sure he would be only a matter of days before I would contact her. Nevertheless in the weeks and months that followed I approached one black law students after another, and one black professor after another and one black administrator after another without being able to discover the identity of the woman described above. As time went on, I approached Derrick Bell who likewise denied having any knowledge of the woman's identity. I then read the book And We Are Not Saved. The woman's description is recorded in the text as a physical definition of its main character, "Geneva Crenshaw."

My difficulty in getting anyone in the black American academic community to pass me any information pertaining to the identity of the woman's stems from two basic points. Foremost, I am a black American writer -- -- of a revolutionary bend -- -- who has graduated from the #1 writing program in the country: the program in creative writing at the University of Iowa. My assessment of narrative focuses on the novel, short story and play forms of fiction. Then after my potential as a writer surpasses that of all the major black American writers of today, while my range of legitimacy as representative of black American spokesman is international in scope, considering the prior

presentation of Malcom X. Vast, a professional revolutionary stance by me as a writer, as opposed to the conservative, civil rights stance of contemporary black American intellectualism and leadership, would be a grave premeditation and of primary concern for those with their hands in the cookie jar: the black middle class. All of this I had not known at the time. It had come upon me by degrees only as time had drawn on; for it was found that the woman described above, Valerie Edwards, and the black revolutionary character, "Geneva Crenshaw," are one and the same person.

Thus, in premeditation of the elimination of civil rights jurisprudence -- to the evaluation, interpretation and resolution of the political economic and social issues involved in contemporary black American experience -- the balance of the black American intellectual forefront bonded and braced together for the purpose of manifesting a wall of obstruction between Valerie Edwards and me. All of this I have gathered by-and-by even as a bee gathers pollin. Consequently, the only method that was available to me as far as finding Valerie was the most primitive means of choosing the name "Valerie" from within the vast array of academic category and pursuing it. Eventually, I had lost even the name "Valerie" and pursued others. That's the awesome quest and journey -- prophesies by Valerie overfilled by me -- complete with what could be perceived as trials, tests, and even confrontations with monsters so representative of a fairy tale.

Nevertheless, I remain aware of the possible fear and insecurity that could be sustained by an individual who may feel threatened by a sudden and

unexpected communication from an unknown person. And I harbor team in acute sensitivity for Professor Martin and offer apology over and again against this intrusion into her person. Moreover, I have run out of possible names to pursue and so remained unfound; such that the previous and haphazardous method of my personal inquisition will cease all together, that none others experience the trepidation allotted Professor Martin so briefly. For during the course of my trials, I have learned of a human being, when necessary, is creative enough to provide adequate (if not ideal) companionship and solus, toward the coveted disposition of a heathy and wholehearted adjustment to the stages or conditions in life.

And with that, Valerie, I leaned the circumstances toward your front for evaluation and resolve. I am here in Washington, D.C., a homeless savior. Are we to me for, if anybody, I **NEED** to be saved.

Yours truly,
Leonard Harrison
Leonard Harrison

March 6, 1998

MEMORANDUM

TO: Dean Alice Gresham-Bullock

FROM: Dawn V. Martin
Visiting Associate Professor of Law

Re: **Request for Meeting Regarding Reconsideration of My Application for a Tenure-Track Position or a Renewal of my Visitorship Professor Status**

This memorandum is written to request a short meeting with you, as soon as possible, for an update of my status with respect to reconsideration of my application for a tenure-track position or a renewal of my visitorship for next year. I am sure that you will recall that at our breakfast meeting in San Francisco on January 17th, 1997, at the AALS Conference, you said that you would "seriously consider" me, at least for a renewed visitorship, if another position opened up for next year. You discussed a possible tenure-track slot which might be released and talked about other "slots" not yet funded. I recently learned from a friend at the Department of Justice (DOJ) that Reginald Robinson, (of DOJ) did not accept Howard's offer to fill the Constitutional Law/Civil Rights position. Since presumably, this position is still unfilled, I ask that I be considered for it. I am well qualified

for this position since I have thirteen years of litigation/policy-making experience in this nation's top civil rights agencies. I have also been teaching Equal Employment Law for four years and created and taught "Race as a Factor in American Law" at Cleveland-Marshall College of Law, Cleveland State University.

My updated resume is attached for your convenience. My November 5th, 1997 memorandum to the APT Committee details my teaching experience at Howard.

During our January 17th, 1997 breakfast, I brought to your attention the representations which were made to me at the time of my job offer. These representations were that the position being offered was "a visitorship in name only" and that "for all practical purposes, this is a tenure-track position." These representations were made expressly in response to my adamant statement that I would not accept a visitorship because my daughter was starting high school the following year and that I did not want to disrupt her life with the possibility of having to move again, particularly after her two difficult years in Cleveland. I explained that, in reliance on the representations that this visitorship offered me as much security as did a tenure-track position, I left a tenure-track position and turned down at least one other tenure-track opportunity. I also told you that I had received no warning that I should seek other employment, although the other visiting professor did (Ironically, this professor received a tenure-track position this year.) You stated that you were unaware of both

of these facts. You also appeared to be unaware that my most recent article had been accepted for publication before the APT Committee made its decision.

I have prepared a lengthy memorandum detailing the injustice of my non-renewal [1] The memorandum states very specifically the harm which this decision has caused. I want the decision-makers to understand the devastation it has caused in my family life. When you take away someone's job, it affects her entire family. Since I am a single mother and the sole support of my daughter, the "penalty" of this decision is falling very heavily on my daughter, both emotionally and academically. Thisharm was absolutely *foreseeable,* since I stated my objection to a visitorship precisely in terms of my daughter's emotional, social and academic well-being when the offer was made. I was given *no reason* for my non-renewal and cannot imagine the reason. Given my credentials and performance at Howard, this decision does not appear to have been made based on merit, dedication, commitment, or concern for students. I would like to meet with you before submitting this memorandum to you and members of the APT Committee.

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1 This decision is particularly painful in light of my dedication to Howard, even in the face of being "stalked" by a homeless man, with a criminal record, using our library. This stalker was later discovered to have pursued other African-American women lawyers in search of the embodiment of a character in Derrick Bell's book, And We Are Not Saved.... I

I am also concerned about rumors which I have heard concerning student protests over my non-renewal. I was told that two petitions in support of my renewal were circulated (one before my rejection and one now circulating). I have been told that students have met with you advocating my renewal. I am not privy to any of the discussions which took place and therefore am completely unable to respond to any issues which might have arisen in the meetings. My "sources" tell me that I am being deliberately excluded from information to protect me from the allegation that I am "orchestrating" student protests, however, this leaves me in a position such that I cannot correct any misinformation stated in such meetings.

(cont'd)
believe that I showed great courage and commitment to my students. I not only continued to successfully perform my professional duties under these frightening circumstances, but also gave additional review sessions and conferences, consistent with my usual practice. It was especially difficult coming to work, since, as documented in my previous memoranda to you on this subject, campus security's "protection" was negligent to the point of being negligible.

I have encouraged students to express their views to their SBA President rather than take other actions which have been suggested namely, calling the press and holding protests, chaining doors and "sitting-in" in your office. I have stressed that students could be arrested, expelled and/or suspended for these acts. I have implored, ordered and *begged* students not to chain any doors, trespass, or take any other action which jeopardizes their own careers in an effort to save my career (As a fireman's daughter, I also stressed that chained doors create a fire hazard, and I will not have this done in my name).

I appreciate the overwhelming love and support which I have been shown by my students, but do not want any of them to suffer in an effort to help me. I also appreciate the kindness and support of colleagues who have expressed surprise and dismay over my non-renewal.

I ask that we meet as soon as possible. I also ask that I be included in any future meetings with students and/or alumni regarding my employment status. Thank you.

cc: Members, Committee on Appointments, Promotions and Tenure

Prof. Isiah Leggett, Chair
Prof. Andrew E. Taslitz, Vice-Chair
Prof Laurence Nolan
Prof J Clay Smith

HOWARD UNIVERSITY
SCHOOL OF LAW OFFICE OF THE DEAN

July 1, 1998

MEMORANDUM

/s/

TO: Norma B. Leftwich
General Counsel

FROM: Alice Gresham Bullock
Dean

RE: **Hostile Work Environment: Sexual Harassment**

I learned that Dawn Martin believed she was being "stalked" on December 1, 1997, upon reading her memorandum dated November 25, 1997, I immediately contacted Associate Dean Newsom to determine what he knew of the matter. He told me that he had advised Ms. Martin to contact the University Security Office and the Metropolitan Police Department regarding what she should do in connection with her personal safety.

Associate Dean Newsom advised me that he thought that MPD should be called in to provide more manpower in tracking down the individual not only to benefit Professor Martin, but also to prevent harm to other women whom this person might stalk or otherwise harass. In that regard Associate Dean Newsom arranged a meeting in the West Campus security office with Professor Martin, representatives of Campus Security and of MPD, and himself. Campus Security and MPD

stated that they would take the necessary action to end the harassment.

Associate Dean Newsom does not recall at what point he discussed the matter with me, but in any event, he believed that the matter was under control because MPD was involved, that the individual would be apprehended and the matter would thus be brought to a swift conclusion.

The following is a chronology of the events relating to Ms. Martin as I recall them.

I replied directly to Ms. Martin's November 25 memorandum (Attachment A) on December 1, 1997 *as* follows:

a) Acknowledged receipt of her November 25th memorandum. (Attachment B);

b) Because there is only one Howard University security officer to patrol the 25-acre West Campus he is, therefore, frequently away from the security office on the sub-basement level, my best advice to Ms. Martin was to immediately contact the metropolitan police and the University Security Office on Main Campus when she had concerns, i.e. the person was on campus or was otherwise threatening to her. Metropolitan police could respond immediately. Also, University Security could contact the law school campus officer on duty by radio immediately, even when the officer is out of the security booth patrolling the campus. The law school administration, staff and faculty can only contact the officer via telephone which he can answer only if he/she is in the security office or go to the law school security office which is of no value if

the officer is out patrolling the campus.

In addition, the following transpired:

(1) On or about the following day, I transmitted a copy of Ms. Martin's report and my response to her to Mr. Dawson, Director of Security via a memorandum asking him to advise law school security officers of the need to be alert to Ms. Martin's concerns. (Attachment B)

2) Early in December Ms. Martin came into my office and excitedly told me of a voice message left by "the stalker." I recall asking if she had seen the person on the premises that day. She answered "no." I accepted as fact what she told me was in the voice message (I had no reason not to believe her), and I elected not to listen to the tape. But, I told her not to delete the message. I immediately told my assistant, Barbara Powell-Smith to call the University Security Office (main campus) to report the voice message and to ask for a security guard to assist Ms. Martin in case the person showed up at the law school at 1:00 p.m. that day pursuant to the voice massage. This was my response since neither I nor anyone other than the police or university security should approach a person being characterized as "dangerous" and "crazy."

Later in the day, Barbara Powell Smith, reported to me that in response to my directions she had called the University security office to report the incident. Dr. Smith said *as* she recalls she spoke with Mr. Dawson and told him that the man had left a message on Ms. Martin's answering machine saying that he would be at her office at 1:00. Ms. Martin waited in Dr. Smith's office during the

telephone conversation with Mr. Dawson. Ms. Martin then told Dr. Smith that she was going to classroom 4 to teach a class from 12:00 to 1:00. At 12:45 Dr. Smith went to classroom 4 to make sure an officer was present to escort Ms. Martin to her office. Dr. Smith is not sure of the officer's name but she believes it was Officer Dowdy who was standing outside the classroom while Ms. Martin taught the class.

3) A day or two later when I received Ms. Martin's second memorandum (Attachment C) I asked the security officer on duty what were they doing regarding the "stalker." I am not certain, but I believe it was Officer Sirleaf that I spoke to. He told me that the day before (or there about) another officer ran after the man believed to have been "the stalker." The officer had chased after the man down to and across Connecticut Avenue, 1 believe Sirleaf told me. He also advised me that the security office had advised Ms. Martin to let them know when she would be on campus and they would accompany her to class and guard her office while she was on campus.

4) Within a few days after speaking with the security officer I telephoned Mr. Dawson's office and left a message (he was not in) that I was calling about security issues at the law school.

5) My office--I and Associate Dean Newsom-gave written and oral notice of Ms. Martin's stalking report to University Security and requested security assistance for her. Apparently neither Campus Security nor MPD posted notices in the security office or in the library describing

the stalker. After ascertaining that there were no such notices, Associate Dean Newsom requested the Campus Security Office to post notices . Since he did not have a description of the stalker, and Professor Martin did, he asked her to prepare a description to be included in notices to be posted. (Attachment D) My efforts were directed at getting security assistance because no one else at the law school is equipped to protect an employee who may be in danger. Contrary to Ms. Martin's allegations, at page 8 there was never any thought given to, interest in, or attempt to "keep quiet" regarding her concerns.

6) The West Campus is an "open" facility. That is, like the main campus, the law library and buildings are open to the general public. There is no "controlled" access.

Retaliation: Non-Renewal of Contract

1) Ms. Martin was offered and accepted a two-year contract to serve as a visiting professor effective August 15, 1996 through May 15, 1998. See letter of Confirmation of Contract (Attachment E) and Personnel Recommendation (Attachment F).

2) Professor Andrew Taslitz, a member of the Appointment Committee in 1995 (and is currently a member) negotiated the terms of the appointment with Ms. Martin on behalf of the School of Law.

3) During the two years she taught courses in Torts I, Evidence, Torts II and Equal Employment Law.

4) At the time the offer was extended and the

contract negotiated, Professor George Johnson was the Associate Dean for Academic Affairs and Henry Ramsey, Jr. was the Dean of the School of Law.

5) The Howard University Faculty Handbook requires that faculty on a 2-year appointment be given six months notice of contract non-renewal.

6) On or about October 31, 1997, I orally advised Ms. Martin that her 2-year contract would expire on May 15, 1998, and pursuant to the Handbook she would receive written notice of the same. I told her it is my practice to speak to the affected faculty member regarding the notice as a courtesy so one does not receive the written notice "cold." I advised her that I was aware that she had a request for appointment to a tenure-track position pending with the Appointments Committee, but I had no idea what the committee would recommend regarding her request. And, therefore, to protect the University I must advise her of non-renewal of her contract, I further stated that while the Committee makes a recommendation on faculty personnel actions, the Dean makes an independent recommendation and hiring decision. I concluded by saying that if the Committee's recommendation and the Dean's determination warranted, contract non-renewal would be reconsidered).

During the discussion Ms. Martin did not ask for my advice on her status in the event the APT Committee did not recommend her for appointment. At the time I was not aware that Ms. Martin believed that her appointment to a tenure-track appointment was a mere "formal" step to be

taken as she appears to suggest in her statements to the EEOC and her later memos on the subject to me. I became concerned when I was advised by my assistant several days later that Ms. Martin's certified letter of non-renewal was returned by the Postal Service as undeliverable (Attachment G) because Ms. Martin had not provided my office with a change of address for her. I had no reason to know whether she had moved because she had not indicated anything related to having a new address when I told her she would be receiving a letter from me regarding non-renewal of her contract. I also did not know whether we had made an error in the mailing.[1]

Faculty telephone numbers are at my fingertips and I, therefore, ventured to check with her regarding her address via telephone. I left a voice message that an important letter I sent to her had been returned to me. The call by me was as much to let her know that we must not have her correct address as to advise her that this particular letter was returned undeliverable.

7) Teacher recruiting and hiring is done on the basis of what our needs are in the various courses to be taught. Assessment of teaching needs is made on an annual basis but with long range and short range planning goals in mind. This process is an ever-evolving process for the Dean's Office depending on myriad factors which include death,

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[1] I was and I remain alert to faculty receiving the required Handbook notice of non-renewal due to a grievance on this issue that was then pending for which non-renewal notice had not been properly given.

retirement, leave requests and administrative duties of faculty members. Planning is necessarily a dynamic process.

At the beginning of the academic year 1997-98 I advised Professor Leggett, chair of the Appointments, Promotions and Tenure Committee that we would need two, perhaps three teachers to teach courses in the areas of commercial law, constitutional law/civil rights, labor/employment law and torts due to retirements of several faculty, death of one faculty member and administrative duties of Associate Dean Newsom and myself. I also mentioned that I did not know at that time what our needs would be regarding courses that Associate Dean Newsom and I ordinarily teach but were not then currently scheduled to teach because of administrative duties. My courses include federal income tax, estate and gift tax, wills, trusts and estates and advance tax problems (14 credit hours). Dean Newsom's courses include wills, trusts and estates, church and state, property (12 credit hours). My final decision on how to cover those courses would be affected by (1) matters pending regarding another tenured professor who teaches two sections of a course which Dean Newsom also teaches, (2) whether Dean Newsom or I would be able to teach one or two courses even with administrative duties, (3) availability of adjuncts and (4) pedagogical soundness of continuing to have adjuncts teach core courses that Dean Newsom and I ordinarily teach (taxation, property and wills trusts and estates) and (5) the contingency of the availability of a professor the APT Committee had authorized me to recruit to a tenure-track position in the constitutional

law/civil rights area the previous year.

A few weeks later Professor Leggett advised me that that APT Committee unanimously wanted me to redouble my efforts to recruit the outstanding constitutional law/civil rights teacher that we had begun negotiations with the previous year. I began to contact the teacher to discuss an offer.

8) Sometime in December Professor Leggett orally advised me that the APT Committee unanimously voted to extend two offers of appointment to individuals that did not include Ms. Martin. They advised me that Professor Cunningham a visiting professor should be offered courses in the labor/employment law area and Mr. Mteema should be offered courses in the commercial law area.

9) In early January 1998, I scheduled a breakfast with Ms. Martin as a courtesy since the APT Committee had by that time advised her of the decision not to recommend appointment. I advised her that if something opened up for which I could consider her, I would so consider her. I do not know what she is referring to when she states that I met with her "under pressure." I was not aware of pressure.

10) Dean Samuel Thompson contacted me sometime in the spring of 1998 on Ms. Martin's behalf. He asked me if it were my view that "she should get out of teaching?" My response was something to the affect of "I cannot say that. The Committee did not share with me specific reasons for their not recommending her appointment. I was not privy to the Committee's deliberations. Students

like her *as a* teacher and for all I know she is a good teacher. I do not know whether not recommending reappointment by the Committee is based on poor performance." I did not tell Dean Thompson or anyone else, emphatically, that Martin is a very good teacher or that her non-renewal had nothing to do with performance. I could not tell anyone that because I did not know (and still do not know) the Committee's exact reasons for not recommending her appointment to a tenure-track position.

The outstanding candidate for constitutional law turned down my offer in late January 1998. Because it became clear in early January 1998 that neither Dean Newsom nor I could return to the classroom in the foreseeable future due to our administrative duties, we agreed that it made pedagogical good sense to hire a qualified full-time person to teach the 4 tax and property courses rather than fill those core courses with adjuncts for the third straight year.

11) Ms. Martin's contract expired on May 15, 1998, and the decision not to reappoint her was based entirely on the fact that the APT Committee did not recommend her for appointment to teach Employment/Labor or Torts courses (courses she has taught before) or taxation, wills trust and estates and property courses she has not taught before.

Attachments

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office

DAWN V. MARTIN,

Claimant,

v. Charge No. 100-98-0614

HOWARD UNIVERSITY

Respondent.

HOWARD UNIVERSITY STATEMENT OF POSITION

I, Leroy T. Jenkins, Jr., am Senior Associate General Counsel for Howard University ("Howard"). I hereby present the following responses to the specific allegations filed by MS. DAWN V. MARTIN.

Allegation No. 1:

I was stalked by a homeless man who was using the law school library. He saw me in the building and began pursuing me by slipping letters to me under my office door, leaving messages on my voicemail and coming to my office because, he said, he believed that I was his "wife."

Although there were many simple steps which Howard's administration could have taken to keep him out of the building and away from me, it failed to make any reasonableeffort to do so, although the

University learned that he had a criminal record and reputation as "crazy" and "dangerous" at the shelter where he slept. I asked some of these simple steps to be taken both orally and in writing.

Response to Allegation No. 1:

The University denies the allegation that it failed to take appropriate measures regarding Claimant's allegation that she was being stalked.

Dean Alice Gresham Bullock learned that Complainant was being "stalked" on December 1, 1997 upon reading her memorandum dated November 25, 1997 (See Attachment A). She immediately contacted Associate Dean Michael D. Newsom to determine what he knew of the matter. He informed her that he had advised Complainant to contact the University Security Office and the Metropolitan Police Department (MPD)regarding what she should do in connection with her personal safety.

According to Associate Dean Newsom, Complainant was reluctant to take the matter to the Metropolitan Police Department (MPD). He found that incredible. Complainant indicated that she had her reasons: "do not make a bad situation worse," she said and the like. Dean Newsom found her position unpersuasive and strenuously urged her to involve MPD because MPD had the manpower, and he believed that it was urgently necessary to keep this man from stalking her and other women in the future.

Dean Bullock transmitted a copy of Complainant's report and her response to Complainant, to the then Director of Security, Mr. Lawrence Dawson. She

asked him to advise law school security officers of the need to be alert to Complainant's concerns. (Attachment B) He did so.

Early in December, Complainant came into the office of Dean Bullock and excitedly told her of a voice message allegedly left by the alleged "stalker". Dean Bullock immediately asked if Complainant had seen the person on the premises that day. Complainant answered "No". Dean Bullock informed Complainant not to delete the message.

Dean Bullock instructed Dr. Barbara Powell Smith to call the University Security Office (Main Campus) to report the voice message and to ask for a Security Guard to assist Complainant in case the alleged "stalker" showed up at the law school.

Dr. Barbara Powell Smith reported to Dean Bullock that in response to her directions, she had called the University Security Office to report the incident. Dr. Smith spoke directly with Mr. Dawson and informed him that the alleged "stalker" had left a message on Complainant's answering machine saying that he would be at her office at 1:00 p.m. Complainant was in Dr. Smith's office during the telephone conversation with Mr. Dawson.

Complainant then told Dr. Smith that she was going to Classroom #4 in Charles Hamilton Houston Hall to teach a class from 12:00 p.m. to 1:00 p.m. At 12:45 p.m. Dr. Smith went to Classroom #4 to make sure that an officer was present to escort Complainant to her office. An officer was there, and according to Dr. Smith the Officer's last name was Dowdy.

Upon receipt of Complainant's second memorandum (See Attachment C), Dean Bullock asked the Security Officer on duty what measures have been taken with respect to the alleged "stalker". Officer Sirleaf advised her that another Officer saw the alleged "stalker" on campus, but unsuccessfully ran after the man. He further advised her that the Office of Security had advised Complainant to let them know when she would be on campus, and they would accompany her to class and guard her office when she was on campus.

Associate Dean Newsom had also given written and oral notice of Complainant's stalking report to University Security and requested security assistance for her. Dean Newsom requested the Campus Security Office to post notices.

Since Dean Newsome did not have a description of the alleged "stalker" and Complainant did, he asked her to prepare a description to be included in notices to be posted. (See Attachment D) Contrary to Complainant's allegations at page 8 there was never any attempt to keep her concerns quiet.

Allegation No. 2:

I was employed by Howard University School of Law on a two-year contract as a visiting associate professor effective August 15, 1996 through May 15, 1998. My contract was not renewed. I believe that my non-renewal is due to my documentation and protests of the hostile work environment which I endured from November through January at Howard University School of Law.

Response to Allegation No. 2:

The University categorically denies the assertion that Complainant was retaliated against due to her documentation and protests of an alleged hostile work environment.

Complainant was offered and accepted a two-year contract to serve as visiting professor effective August 15, 1996 through May 15, 1998. *(See* letter of Confirmation of Contract (See Attachment E) and Personnel Recommendation (See Attachment F).

Professor Andrew Taslitz, a member of the Appointment Committee in 1995 (and currently a member), negotiated the terms of the appointment with Complainant on behalf of the School of Law. For the next two years Complainant taught courses in Torts I, Torts II, Evidence and Equal Employment Law. At the time the offer was extended, and the contract negotiated, Professor George Johnson was the Associate Dean for Academic Affairs and Henry Ramsey, Jr., was the Dean of the School of Law.

The Howard University Faculty Handbook requires that faculty on 2-year appointments be given six months notice of contract non-renewal. On or about October 31, 1997, Dean Bullock orally advised Complainant that her 2-year contract would expire on May 15, 1998, and, pursuant to the Handbook she would receive written notice of the same. Dean Bullock advised Complainant of her practice to speak to the affected faculty member regarding the notice as a courtesy so one does not receive the written notice "cold".

Dean Bullock later advised Complainant that she was aware that she had a request for appointment to a tenure-track position pending with

the Appointments Committee, but had no idea what the committee would recommend regarding Complainant's request. Therefore, to protect the University, Dean Bullock was compelled to advise Complainant of her non-renewal of her contract.

During the discussion Complainant did not ask for Dean Bullock's advice on her status in the event the APT Committee did not recommend her for appointment. At the time Dean Bullock was not aware that Complainant believed that her appointment to a tenure-track appointment was a mere "formal" step to be taken as Complainant appears to suggest in her statements and her later memos on the subject to Dean Bullock.

Dean Bullock became concerned when she was advised by Dr. Barbara Powell Smith that Complainant's certified letter of non-renewal was returned by the Postal Service as undeliverable (See Attachment G). Complainant had not provided the Office of the Dean with a change of address. Dean Bullock went so far as to call Complainant and left a voice message that an important letter she sent to her had been returned.

Therefore, the decision not to reappoint Complainant was based entirely on the fact that the APT Committee was in need of a faculty member to teach courses in Taxation, Wills, Trusts and Estates and Real Property. Complainant while under contract with the School of Law taught classes in Employment/Labor Law and Torts. Since the School of Law was in need of a faculty member with an academic background in the aforementioned areas, Complainant's contract was not renewed.

CONCLUSION

I, Leroy T. Jenkins, Jr., having read the foregoing

Response to Particulars of Claim state that the responses contained herein, and the attachments thereto, are true and correct to the best of my knowledge and belief.

/s/

Leroy T. Jenkins, Jr. /s/

Sworn to me this 7th day of December, 1998
Betty Lancaster Short
Notary Public District of Columbia
My commission Expires March 14, 2000
(seal)

Derrick Bell, Visiting Professor
New York University School of Law
40 S. Washington Square, Rm. 208A
New York, NY 1 0012

April 9, 2002

AFFIDAVIT

I, Derrick A. Bell, swear and affirm that the statements in this affidavit are true to the best of my belief.

I have been asked to detail my experience with Mr. Leonard Harrison. I am able to do so because in my 32 years of law school teaching, my brief contact with Mr. Harrison was one of the most upsetting, frightening really, experiences in my career. I later wrote up the incident and am able to recall it both from memory and my writing about it.

It was the summer of 1990, and I was a professor at the Harvard Law School. A young black assistant professor in the political science department, I don't remember her name, had called to say a black man had come to her office and told her he was looking for Geneva Crenshaw, a fictional character in several of my books. The young woman knew of my work and told the man that she was not the person he was seeking. She was upset by the visit and I recall having lunch with her and suggesting that if he returned, she should call the campus police. Then, a few weeks later, I was working in my office and responded to a knock on my door. I opened it and found a somewhat seedily dressed but quite articulate black man standing there. He said his name was Leonard Harrison and he was seeking the real-life model for Geneva Crenshaw, the fictitious

heroine of many of my allegorical stories about race.. He told me that he had read about her in one of my books, And We Are Not Saved. I tried to assure him that the Geneva Crenshaw character was purely fictional. He would have none of it. He told me quite seriously that she thinks like I do. He said he would find her and together they will plan and lead a long-overdue racial revolution in this country.

As an author, I am always pleased when someone reads my books, but Leonard Harrison's serious-mindedness made me nervous. He seemed mentally disturbed and scarily purposeful. He talked about recruiting men for his revolution from the black community in the Roxbury section of Boston. I recall that he also planned on enlisting black men as they were released from prison. As I recall, he offered more details about his revolution than I cared to hear. At some point, I told Mr. Harrison that I was busy and really had to get back to work. He raised several more questions about Geneva Crenshaw: In which department was she working? When had I last seen her? When did I expect to see her again? Again, I told him that Geneva Crenshaw did not exist.

Here I recall almost his exact words. "You're lying, man. Don't you recognize that in denying Geneva Crenshaw's existence, you are denying your existence. There is no hope for you, man. No hope."

Harrison started to leave and then turned back and told me that I would see him again, that he was coming back. "Oh?" I remarked dubiously.

"Yes," he responded with that same single-minded seriousness. "Once Geneva Crenshaw and I link up and get our revolution started, one of my first missions will be to return and blow your head off."

I was unnerved, but I tried to take it lightly and responded by questioning his priorities. "You know," I

told him trying to appear light-hearted, "in order to reach my office, you will have to pass the offices of several of my white colleagues."

"I know that," he replied, "but the revolution will have to deal first with all you black tokens in high places. As black agents of the enemy, you are more dangerous and more damaging than the real enemy." He stared at me as he delivered this. I tried to register no emotion.

"So," I said, feeling my anger rise, "your racial retaliation theory will begin at home."

"It will begin with the enemy," he responded. Then, he turned and walked away.

I tried to forget Leonard Harrison and return to my work. I couldn't. Instead, I called the campus police and told them someone had come to my office and threatened my life. Two officers were at my door within 10 minutes. I told them about the visit and the threat as they took notes. In a day or so, they reported that working with the Boston Police Department, they had traced Harrison to a homeless shelter and had ordered him not to return to the campus, threatening that if he did, he would be arrested and prosecuted.

That is not the end of the story. I recall hearing that he visited black women on other campuses. I understand that he tried to see Professor Lani Guinier at the University of Pennsylvania Law School and I believe she had to take action to keep him away from the school.

In addition, I learned from the writer, Mr. James McPherson, [home address deleted], Iowa City, Iowa 52240, that Mr. Harrison applied to the Iowa Writers Institute where Mr. McPherson is a faculty member and though he lacked the credentials required for admission, gained at least provisional

admission. Mr. McPherson took him under his wing helping him in a number of ways with his writing and with personal issues. Mr. Harrison was not able to do the work satisfactorily and when he was not allowed to continue, turned on Mr. McPherson with a serious of threats.

I heard no more about Leonard Harrison until Professor Dawn Martin e-mailed me in about 1999, that he had written her and otherwise contacted her in quite threatening ways. I was surprised that Harrison appeared to have continued his pursuit of black, women law teachers for so many years after my experience with him. Professor Martin also told me of her unsuccessful efforts to obtain effective security at the Howard Law School and that her contract to teach there had not been renewed.

/s/
Derrick A. Bell
Kaoula Brohm
Notary Public, State of New York
No. 01BR6014397
Qualified in Westchester County
Commission Expires 10/13/2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

DAWN V. MARTIN

NO. 06-7157

Appellant,

v.

HOWARD UNIVERSITY, et al.,

Appellees.

(REVISED TRANSCRIPT)

Monday, March 17, 2008

Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice.

BEFORE:

CIRCUIT JUDGE HENDERSON AND SENIOR CIRCUIT JUDGES EDWARDS AMD WILLIAMS

APPEARANCES:

ON BEHALF OF APPELLANTS:

DAWN V. MARTIN, ESQ., Pro Se

ON BEHALF OF APPELLEE:

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P R O C E E D I N G S

THE CLERK: Case number 06-7157, Dawn V. Martin, appellant versus Howard University, et al. Ms. Martin for the appellant, Mr. Schwalb for the appellee.

ORAL ARGUMENT OF DAWN V. MARTIN, ESQ.
ON BEHALF OF THE APPELLANT

MS. MARTIN: Good morning, Judges Edwards, Henderson and Williams. My name is Dawn Martin, I'm the plaintiff/ appellant representing myself through my law firm. Also present in the courtroom is Roberta Wright, counsel for amicus curiae, the National Association of Women Lawyers.

The most important issues in this case revolve

around the interpretation of Title 7 of the civil rights act of 1964. The precedent set by this Court will determine how employers and educational institutions will respond to stalking and other types of workplace and campus violence, particularly when directed against women.

If a woman can be stalked at her workplace by a serial stalker, and fired for asking her employer to take the reasonable steps to keep him out of the workplace, then women will be forced to chose between their safety and their livelihood, a Hobson's choice.

The lynchpin at the Title 7 case is the jury's determination that when the stalker harassed me in my workplace, in the hope that I would become his wife, his pursuit of me was not sexual in nature or based on my gender. This question should never have been before a jury. Judge Hogan decided it in 1999 as a matter of law based on the undisputed facts, holding that quote --

THE COURT: That was a decision of Judge Hogan, if I recall, rejecting a motion for summary judgment by Howard, right?

MS. MARTIN: Yes, Your Honor.

THE COURT: So presumably, as a holding, that's what it added up to.

MS. MARTIN: Well, he made certain determinations -- THE COURT: I know he said various things –

MS. MARTIN: Yes. Yes.

THE COURT: -- but in talking about determinations, the holding was that Howard was not entitled to summary judgment, right?

MS. MARTIN: Correct, Your Honor, and yet --

THE COURT: And you're extending law of the case doctrine which is notoriously the weakest of the preclusion doctrines, to statements that are not holdings?

MS. MARTIN: Well, he did make certain holdings. I would like to quote. He said, it is clear the plaintiff is only --

THE COURT: He said things. I don't see how the holding is anything more than that Howard is not entitled to summary judgment on the point.

MS. MARTIN: Well, he identified the specific issues that presented general material disputed facts, would be decided by the jury. And he said that those with respect to the sexual harassment case would be, number one, whether the harassment was severe and pervasive, and number two, whether Howard took reasonable steps to end it.

And he said, based on the undisputed facts that, quote, it is clear the plaintiff was under the object of Harrison' attention because she was female.

Also, it is not just my interpretation of the 1999 opinion, but in 2003, Magistrate Judge Facciola stated very clearly that, it is in the brief as an exact quote, and I tried to take the whole quote, but he said that these are issues that will not be revisited, but were decided by Judge Hogan, that

are not triable issues of fact. He said, triable issues of fact in 1999 are still the triable issues of fact in 2003. And he admonished Howard for raising this issue again. He said very clearly that Judge Hogan decided certain issues, as a matter of fact, which will not go before a jury. And the very first one he stated would not be addressed by a jury was that Judge Hogan decided that Harrison' harassment was on the basis of sex.

Now, not only was that an important recommendation, but Judge Hogan adopted that in September 2005, as an opinion of the Court. And that was in the face of an objection that I filed against the, adopting the report and recommendation, with a response by Howard, and a reply by me, and Howard even agreeing that Judge Facciola's report and recommendation was replete with factual errors, and not objecting to Judge Hogan doing a de novo review of the motion for summary judgment. And yet Judge Hogan adopted the opinion as his own.

So if there was any question, if Judge Hogan disagreed with Judge Facciola's interpretation of his decision, certainly that was the opportunity to say so. Instead, he adopted it.

So I went into the trial understanding the issues that would be litigated with respect to the sexual harassment claims in the order, number one, that the, whether the harassment rose to the level of being severe, pervasive, clearly a hostile work environment for me. And number two, whether Harrison took reasonable steps to end it. That was stated repeatedly over a six-year period in three different decisions.

So to go into Court, into trial saying, in 2006, these are the issues that I have to prove, and by the way, is of course, in the brief, when we attempted to approach the issue of whether Dean Bullock understood my complaint of Harrison's conduct to be based on sex, Judge Hogan actually stopped the cross-examination of Dean Bullock and said, that's just not evidentiary in value here. It doesn't go to prove or disprove the fact at issue.

And the very fact that Judge Hogan prevented us from proving during trial, turned out to be the very fact that the whole case turned on.

Also, when we approached Officer Sirleaf who had testified in his deposition that he perceived my complaint to be one of harassment on the basis of sex, and that was in his deposition testimony, when we approached that when he was on the stand, Judge Hogan again stopped the examination of the witness and said, that's obvious. Move on, to my counsel.

So not only were we told three times over a period of six years that this was not the issue, but when we touched on it in the trial, Judge Hogan stopped us from proving it, and then after the trial was over, he changed all the rules and said, I'm giving this issue to the jury. And I argued during the argument on motions for judgment after all the evidence was in, that Howard should not be permitted to relitigate this issue because it had been decided in '99. And Judge Hogan said that he was going to let them argue it again.

So I was stuck with it on the verdict form. Then, of course, I hoped that instructions would be

sufficient so that the jury would come to the same obvious conclusion that everyone else had throughout this case, but Howard's argument throughout the trial was that, to tell the jury that I was not entitled to Title 7 protection because in my memoranda to Dean Bullock, I referred to Harrison, the stalker, as the stalker, instead of as a sexual harasser. And that was the reason that -- and I was obligated to refer to him as a sexual harasser or call the conduct sexual harassment in order to get Title 7 protection.

Of course, it's not the state of the law. It's not what Judge Hogan said in '99. And when I specifically asked for an instruction from Judge Hogan to take language out of his own '99 opinion and instruct the jury that you don't have to say the words, sexual harassment, in order to obtain Title 7 protection, he refused to do that. He also refused to instruct the jury with respect to the DC stalking statute which defines stalking as harassment.

So Howard's attorney created the confusion telling the jury that harassment and stalking were not the same thing; that I was not credible when I claimed that I complained of sexual harassment, because my memos said stalking. And apparently the jury got confused by that argument.

And their question to the Court reflects their confusion because they said, and I want to get the quote exactly, wives are typically female. Is the answer to 1C an automatic yes, simply because the plaintiff is female? And this question reflects their common sense understanding that wife is a gender specific term, but they had not gotten the clarification that they had requested and were

confused by the definition. It's not their job to determine what constitutes sexual harassment or protected activity, but only the facts that actually occurred. And I see that I am running out of time.

I do want to get to, once the Court vacates the jury's finding that Harrison's conduct was not based on sex, complaints about Harrison become protected activity under Title 7, and then the Court is faced with the question of whether Howard produced a legitimate nonretaliatory reason for my rejection for a permanent position on my nonrenewal.

The jury never reached this question. Howard's purportedly nonretaliatory reason has been a fraud upon the Courts from the beginning. In it's May 11th, 2001, official appointments committee statement, Howard stated that as of December 18th, 1997, Christie Cunningham had already published her article and that I had not even completed mine.

In fact, Professor Cunningham's article was not published until a full year later in the winter of 1998. And the appointment's committee members testified that, as of December 18th, 1997, they all actually knew that my article was not only completed, but also accepted for publication.

Now, because Howard never produced any evidence of its purported legitimate nonretaliatory reason, and because the undisputed documents and Howard's own witnesses proved that to be blatantly false, I am entitled to judgment as a matter of law on the retaliation claim.

THE COURT: I'm looking at the Magistrate

Judge's ruling. I don't think it says what you're suggesting. It just says, I will not permit Howard University in the second motion for summary judgment, to relitigate those issues that were resolved against it. And the Trial Judge merely said, I'm rejecting summary judgment. The matter goes to trial. That's all.

MS. MARTIN: Your Honor, if you continue with the -- THE COURT: Triable issues of fact in '99 remain triable issues of fact in 2003.

MS. MARTIN: Yes, and he says, more specifically, Judge Hogan concluded, number one, the alleged harassment by Harrison for plaintiff was based on her sex. And he continued. Number two, he identifies what the questions are. He said, two, Harrison's conduct was sufficient severe and pervasive to be actionable under the rule of a hostile environment claim was a jury question.

He goes on to say what the additional jury questions are. But the very first thing that he says under more specifically, the Chief Judge concluded the alleged harassment by Harrison of the plaintiff was based on her sex.

And with respect to the retaliation claim, I believe that I was entitled to summary judgment in 2002, judgment NOV in 2006, and a default judgment in 2002 when Howard was held in contempt of Court for its extensive discovery violations.

Howard delayed trial in this case by at least five years, depriving me of my original trial date of May 1st, 2001. And Howard's fraud should be put to an end here and now. I respectfully request

this Court's de novo review of these dispositive motions and judgment as a matter of law with remand to the Trial Court on the issue of damages. Thank you. I would like to save some time for my rebuttal.

THE COURT: Mr. Schwalb.

ORAL ARGUMENT OF BRIAN L. SCHWALB, ESQ.

ON BEHALF OF THE APPELLEE

MR. SCHWALB: May it please the Court, my name is Brian Schwalb. I represent Howard University. Mr. Cook, who is the representative of former Dean Bullock, has authorized me to speak for both appellees in this appeal.

This case, like many contract and employment cases, was, by its nature, intensely factual and the Trial Court treated it as such. After seven years of litigation this case came on for nearly a month long trial in April of 2006. The jury deliberated after hearing multiple witnesses. After multiple documents, including the plaintiff's contemporaneous writings being admitted into evidence.

The Trial Court bent over backwards to ensure the appellant had a fair trial. And at the end of that process, the jury decided, based on evidence before it, the facts at issue. It decided that the plaintiff had not proven a contract claim.

Her claim that there had been a meeting of the minds at the University when she was chosen to

come for a two-year visitorship that somehow allowed her a guaranteed provision to continue on at the school at the end of her two years was rejected. There was no meeting of the minds. And there was plenty of evidence at trial as to why she didn't prove that case.

The jury also had evidence with respect to the retaliation claim. There was ample evidence during the course of this long trial about what the appointments, promotion and tenure committee considered in deciding who would be selected for the open employment opportunity and labor position.

And the Court also allowed evidence in front of the trial as to whether or not there had ever been a protected activity engaged in by the plaintiff when she complained about security issues on campus.

THE COURT: It seems to me there are two things going on in this case. One is about an employment claim, that is, I was discriminatorily foreclosed from further position, either as a visitor or a tenured track position, and that goes to some of the contract fight. Another is a claim on sexual harassment, more generally that is, while I was there, whether or not I was entitled to stay, I was unlawfully harassed.

And the gist of what I was hearing her to argue, and what appears in the brief, is that she was allegedly foreclosed from litigating the critical question as to whether the harassment was based on sex because she thought the District Court had decided that question in her favor and then thereafter was precluded from proffering proof to deal with that question. So what is your

response on that?

MR. SCHWALB: Well, we know that it is not the case. If we look at the discussion of the Trial Court when the verdict form and the jury instructions were being discussed at the end of trial, Judge Hogan went through the jury verdict form. And one question, question 1C dealt directly with the question of whether Mr. Harrison's conduct was because of sex or gender.

THE COURT: Her answer is going to be, that may well be, but in the preceding trial I didn't know that we were litigating that, so I just want to hear what your answer is. I understand that.

MR. SCHWALB: There was no objection at that time to Judge Hogan when these questions were the ones that were isolated. And Your Honor, this was extensively pre-tried -- this case. There were three separate pre-trial conferences. And a trial set to begin in January that was the night before trial postponed.

The issues that were going to be tried were isolated, focused on by the parties, by the Magistrate Judge and then by Chief Judge Hogan before trial.

THE COURT: And this was one of them?

MR. SCHWALB: And this was one. m

THE COURT: And what document is it that it shows up?

MR. SCHWALB: I don't know that there is a document in the record that shows that. The

evidence that was introduced during the course of trial repeatedly, during the plaintiff's case, went to the question of --

THE COURT: You seem flippant here.

MR. SCHWALB: -- whether, what was the nature of the contact between Mr. Harrison and the plaintiff. Her memos, her discussion of the voice mail messages that were there, the nature of the contact, as she described it, the witnesses she called all offered the same testimony as to whether or not Mr. Harrison's comment was because of sex or sexual in nature. The case was not tried any differently than it would have been.

And, in fact, all of the parties realize that the pretrial rulings of the Court, as Judge Williams focused on, Trial Courts are confronting regularly motions to dismiss and motions for summary judgment. The lion's share of case law in this Court on employment cases deal with whether summary judgment is appropriate.

Here we have a case before this Court after a full record, after a full four-week trial. And the question of whether or not Mr. Harrison's conduct was because of sex or sexual in nature, was before the jury. The jury was clearly focusing on that question.

It asked the question during the deliberation process. And the instruction from the Trial Court that no, this is not a per se ruling, this is not a question of law, this is a factual issue you must consider and rule on, based on the evidence before you, was the proper instruction.

And at this stage, the question is was the evidence so one-sided that no reasonable juror could conclude that it was not because of sex or sexual in nature? And we submit the plaintiff, the appellant cannot meet that burden here.

There was ample evidence at trial to suggest that Mr. Harrison's conduct was based on a misidentification; that he was not acting in a sexual nature. There was nothing in his communications to the point that suggested anything of a sexual nature. The slender read on which this case became a sexual harassment case was that he made a misidentification and he thought she was his long lost wife. That's the only connection to this being a because of sex or gender case. And the jury saw --

THE COURT: Why isn't that enough?

MR. SCHWALB: Because that would, we submit, that would sweep into Title 7 analysis and discrimination analysis anytime –

THE COURT: I mean, if she had been a man, he wouldn't have misidentified her as he did.

MR. SCHWALB: Well, there was evidence at trial that Mr. Harrison had stalked a man, Professor Bell. So if hypothetically it was Professor Bell's discrimination claim that Mr. Harrison stalks male professors, Professor Bell would have that same position.

The law, we would submit, doesn't make every time a woman is the subject of a stalking or a domestic violence issue a Title 7 federal anti-

discrimination case. There are common law protections available. As Judge Hogan commented throughout the course of trial, the case really ended up being tried on this theory, it's much more like common law negligence premises liability. Did the university protect its professors from a trespasser? All of its community, its students, its faculty, its administrators, because of a potential criminal issue.

Simply because of a misidentification, any time a woman was misidentified, one of her qualities would be her gender. But there may be a whole assortment of other factors, and here the factor was, as Mr. Harrison's subsequent letter indicated, a misidentification. The jury also had before it the contemporaneous comments of the witnesses at the time. The plaintiff never characterized this issue with Mr. Harrison as being of sexual nature, or because of gender.

It didn't become a sexual harassment claim until she was challenging the APT committee's decision not to recommend her, where she was reaching for a hook for her retaliation claim. And that's where, all of the sudden, in the spring of 1998, for the very first time, the issue arose that somehow Mr. Harrison's bizarre and fleeting conduct was of sexual harassment.

And the jury heard the timing of the plaintiff's claims when they were raised for the first time. They saw her memos where she never described Mr. Harrison's conduct in sexual terms as a sexual harassment claim.

Here was a woman who was making a complaint

that she was a pre-eminent equal employment opportunity professor, having had experience at the EEOC. If anybody was sensitized to raising this as an issue of sexual harassment, it was this plaintiff.

Her best friend testified during the course of trial, Ms. Guerant, who was also at the EEOC. She was asked, did you ever, while all these proceedings and events were occurring, consider this to be a sexual harassment claim? Did you ever urge the plaintiff to make a sexual harassment claim? She said, no.

Dean Bullock and Dean Newsome testified, they were asked, did you perceive this to be a sexual harassment claim? They said no. So all of this evidence was before the jury, and the jury could consider, and reasonably did consider, that the plaintiff did not prove her case on that element.

The retaliation claim is, again, an attempt by appellant to bootstrap in on the sexual harassment theory into a retaliation claim. And of significance in this case, the jury found that the plaintiff was not engaged in protected activity when she made the complaint about Mr. Harrison. And equally important, that the university did not perceive her to be making a Title 7 complaint, which the law says is the benchmark, the principal point in making a retaliation claim.

An employer needs to know or reasonably believe that their employee is engaged in protected activity, at which point the employer cannot retaliate for that conduct. Here, the jury found that the plaintiff was not engaged in protected activity when she complained about Mr. Harrison.

Contrary to the briefs, this is not a question of law. This is a question of fact. And the jury had the facts before it, and decided that she had not proven her case.

I need to very quickly say, because I did say to Mr. Cook I would speak for Ms. Bullock's points. One, the Trial Court was correct on a motion to dismiss in dismissing the attentional enforcement claim. There was nothing in the complaint that would satisfy the common law standards of intentional infliction. Second, much of the attention and argument in the briefs and oral argument about Dean Bullock's alleged perjury is hyperbole. Dean Bullock

was there at trial. She testified. And what the plaintiff/appellant here tries to suggest is that Dean Bullock testified inconsistently at trial from a memo she had written before trial. She was subject to cross-examination. The jury heard the cross-examination. The jury resolved whatever inconsistency might be there.

Unless the Court has any questions for me, I will sit.

THE COURT: All right.

MR. SCHWALB: Thank you.

THE COURT: Does Ms. Martin have any time?

DEPUTY CLERK: She has nothing.

THE COURT: All right. Why don't you take two minutes, Ms. Martin.

REBUTTAL ARGUMENT OF DAWN V. MARTIN, ESQ.

ON BEHALF OF THE APPELLANT

THE COURT: Could you start by saying where in your opening brief you make an argument that you were fooled into not submitting evidence on the proposition that it was sexual harassment versus something else?

MS. MARTIN: Well, in my opening brief, starting on page eight, I believe, I, my first argument is the sexual harassment claim, and I quote Judge Hogan from '99, I quote, from 2003 --

THE COURT: But that's, 1A is the law of the case argument.

MS. MARTIN: Yes. Yes, Your Honor.

THE COURT: But I don't see from the headings your framing that as the argument that you were surprised at trial?

MS. MARTIN: Yes, well, that's the point, Your Honor, of the law of the case, that you should be able to rely on the previous rulings of Court and that the --

THE COURT: No, no, no.

THE COURT: No.

THE COURT: It's a very different proposition. And you're talking about you're in the realm of error. Lots of case law to suggest that. If, in fact, this was tried --

MS. MARTIN: Yes.

THE COURT: -- and it was presented, whatever your thoughts were about what the Trial Judges did become moot. MS. MARTIN: Yes.

THE COURT: We all know that. So what Judge Williams is asking is something I would like to know too. Where is it that you are making the argument that almost a due process kind of argument --

MS. MARTIN: Yes.

THE COURT: -- you were foreclosed from trying the case on these terms, because I don't see the argument either.

MS. MARTIN: Actually, I do use the words due process in the brief, and I, in fact, use those exact words. And let's see, at the moment I tried to get that, but I don't know if I can come back it, and perhaps my paralegal can look that up. But I do, absolutely use the words due process.

THE COURT: No, no, I'm asking whether you made the argument that you were foreclosed from trying the issue which was clearly tried, with clearly lots of testimony on it. Where is it you say, don't be fooled. I was foreclosed from trying this and I was shocked at the end of trial that this was an issue. Where is that? Because if that was argument, you are an attorney, that would be one of the first things you would say --

MS. MARTIN: Yes, Your Honor.

THE COURT: -- and you'd have a heading, probably, to say it.

MS. MARTIN: I did make that argument. I did point out that Dean Bullock's testimony was cut off. And I would like to address that first, if I could follow up on Judge Williams' question.

With respect to Dean Bullock's perjury, her words, her July 1st, 1999, memo to her own general counsel in response to my EEOC charge, in which by the way I never alleged when they were charged at the EEOC with sexual harassment. They never alleged that it wasn't a sexual harassment case. Instead, they tried to claim that they took reasonable measures to stop it.

And there were additional false statements made by Dean Bullock in that EEOC position statement, where she says that she was, she enlisted the assistance of Lawrence Dawson to help her address it, and he was working on it.

And they took the position, Howard responded with that answer in answers to interrogatories, and when I was finally permitted to depose Lawrence Dawson in 2002, he testified, which he did testify at trial, that the Dean had never discussed it with him, never told him anything about it. He was not involved in it at all.

And Dean Bullock admitted that that was the case, that she had never talked to anyone else in campus security, while she had written to me a memo stating that she was discussing the matter with Lawrence Dawson to try to provide me with protection.

And that was one of the reasons that I didn't immediately file an EEO charge, because it's not an EEO case against the employer unless and until the employer does not take the reasonable steps. It is third party harassment. And reporting procedures are very different.

THE COURT: Let me stop you because you are over your time.

MS. MARTIN: Yes, Your Honor.

THE COURT: You need to respond -- has your question been answered?

MS. MARTIN: Yes. I focused on it in the reply brief, in response to Howard's argument. And I, as I say, do specifically --

THE COURT: So you are saying it was not a principal claim in your opening brief.

MS. MARTIN: It was, Your Honor.

THE COURT: I mean, I'm looking at your opening brief, and there are a lot of headings, and this is not one of them.

MS. MARTIN: It was within the law of the case argument because the fact that there were these three decisions over a period of six years, and Judge Facciola's decision does make it very clear in identifying what issues will be tried. I relied on that going into trial. And Officer Sirleaf was cut off. Dean Bullock was cut off when my attorneys attempted to question them on this issue. And Judge Hogan even said during the trial,

it's obvious, move on, on that point.

So having been told it's obvious and to move on and away from it, and being told again to move away from it when Dean Bullock was being questioned, there was no opportunity to confront her with it. And many witnesses were impeached with their deposition testimony. And the real issue is with respect to time, because Howard was permitted to put its defense on during my case in chief, and my case in chief was completely usurped from me and controlled by Howard.

And so I did not have the time, I had to constantly rebut Howard's arguments in the middle of my case in chief. So we had to make some decisions at the end with respect to what issues we were going to come back to and really impeach the witnesses on. And because we had been told that this was not going to be an issue that it had already been resolved back in '99 and affirmed in 2003 and 2005, that's not an issue that we focused on for impeachment. We did impeach --

THE COURT: All right. Do you have any other questions? All right. Your time is up.

MS. MARTIN: Thank you, Your Honor.

(Recess.)

DIGITALLY SIGNED CERTIFICATE

DEPOSITION SERVICES, INC., hereby certifies that the foregoing is a correct transcription of the electronic sound recording of the proceedings before the U.S. Court of Appeals in the matter of:

CASE NO. 06-7157

DAWN V. MARTIN

V.

HOWARD UNIVERSITY, ET AL

March 20, 2008

Teresa S. Hinds, Transcriber /s/

STATUTES AND REGULATIONS

I. Federal Statutes and Regulations Prohibiting Sexual Harassment

Federal Statutes

Title VII of the Civil Rights Act of 1964

42 U.S.C. § 2000e-2(a), Title VII of the Civil Rights Act of 1964, provides, in pertinent part:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms and conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Federal Regulations

EEOC Guidelines, 29 C.F.R. Section 1604.11(e), in pertinent part, provides that:

> an employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

Federal Statute Prohibiting Age Discrimination

Chapter 14. Age Discrimination in Employment

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

...

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan....

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

District of Columbia Statute Prohibiting Sexual Harassment and Age Discrimination

The D.C. Human Rights Act, D.C. Code, § 2-1402.11 provides, in pertinent part:

> (a) General. -- It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation of any individual:
>
> (1) By an employer. -- To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee ....

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No. 08-204

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAWN V. MARTIN, Esquire,

Petitioner,

v.

HOWARD UNIVERSITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION FOR RESPONDENT HOWARD UNIVERSITY

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QUESTIONS PRESENTED

Whether the court of appeals correctly affirmed the district court's grant of summary judgment narrowing petitioner's retaliation claim, and the jury's subsequent verdict that petitioner failed to prove her sexual harassment, retaliation and breach of contract claims.

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STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et seq.* Pet. App. A-240 1

District of Columbia Human Rights Act, D.C. Code, § 2-1401.01 *et seq.* 1

As explained more fully below, the University disagrees that the EEOC Guidelines, 29 C.F.R. § 1604.11(e) and Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621-634, *et seq.* are applicable in this case.

STATEMENT

This is the latest, and hopefully final, chapter of petitioner Dawn Martin's long-running attempt to force her way into a tenure-track position at Howard University's Law School. A jury in the U.S. District Court for the District of Columbia, after a multi-week trial, concluded that Howard University had not violated petitioner's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), *et seq.* or the District of Columbia's Human Rights Act, D.C. Code, §§ 2-1401.01, *et seq.*, and that petitioner had not proven that she had a contractual right to continued employment at the Law School after her two-year visiting position expired. Despite the petition's mischaracterization of the facts and legal issues that were actually before the trial court and jury in this case, there are no questions worthy of certiorari. The petition should be denied.

This case does not present any important unresolved or novel legal question, and creates no split with either this Court's precedent or with decisions in other circuits. Rather, it is a straight-forward employment dispute arising out of a visiting law professor's unsuccessful efforts to obtain a tenure-track teaching position after her two-year contract ended. The district court, with considerable patience and deference, ensured that Martin had a fair opportunity to present her evidence

and arguments to the jury. After hearing all of the evidence, the jury concluded that Martin failed to prove any of her claims (which included sexual harassment, retaliation and breach of contract). The district court confirmed the jury's verdict, denying Martin's post-trial motions in a well-reasoned published memorandum opinion. Pet. App. A-138 – A-158. Martin appealed, and after extensive briefing and oral argument, the Court of Appeals for the District of Columbia Circuit affirmed, explaining its reasoning in a detailed (but unpublished) opinion. Pet. App. A-2 – A-12.

Most of the 16 "questions" Martin now purports to present in her petition were not presented to the jury or the trial or appellate courts below. Indeed, rather than focusing on the factual record established after extensive pre-trial discovery and through the presentation of evidence at trial, the petition brazenly directs this Court to petitioner's untested (and ultimately unproven) version of the facts as she alleged them in her 1998 complaint (Pet. App. 5, FN. 4). The petition also improperly directs this Court to evidence that was excluded at trial and never before the jury, specifically an affidavit from an individual whom the University was not able to cross-examine. Pet. App. A-213 – A-216. This document was specifically excluded from evidence at trial and should not have been presented to this Court in petitioner's appendix.

The district court detailed the relevant facts, as they were established at trial, in its decision denying Martin's post-trial motions:

> Plaintiff Dawn Martin, a Visiting Professor at Howard University School of

Law from July 1996 through May 1998, brought this action against several defendants on May14, 1999. . . .

Plaintiff alleges that she was the victim of a hostile work environment in violation of Title VII and the District of Columbia Human Rights Act as a result of the conduct of Mr. Leonard Harrison, a homeless person who was neither an employee of, nor a student at, Howard. Specifically, Mr. Harrison sent Plaintiff two letters that were hand-delivered to Plaintiff's office, left voice mail messages for her, and attempted three personal visits to Plaintiff's office (Plaintiff was only in her office during the third visit and Harrison was chased out by a security officer), and at one point stated that he thought Plaintiff was his wife. Plaintiff has claimed that Howard's response and inaction towards Mr. Harrison is a violation of Title VII. Plaintiff's other two claims include retaliation in violation of Title VII and breach of contract. Plaintiff asserted that because of her complaints regarding Mr. Harrison and her requests for protection from Mr. Harrison, the administration retaliated against her in several ways. . . . [First,] the then Dean of the law school, Dean Bullock, got the Appointments, Promotions and Tenure Committee ("APT Committee") to not recommend Plaintiff for the EEO/Labor Law tenure-track position she sought and to instead recommend Professor Cunningham, and [second,] that Dean Newsom sent Plaintiff

> a letter asking her to vacate her office early, in May 1998, rather than in June or July 1998 when most professors had to leave. Plaintiff also alleges she had an oral contract that her . . . visitorship would be renewed until a tenure-track position became available, at which time she would get that position. Plaintiff alleged the contract was breached when she was not selected for any tenure-track position.

Pet. App. A-2 – A-3.

Shortly after Martin filed her complaint, and long before trial, in a Memorandum Opinion dated December 16, 1999, the district court (C.J. Thomas F. Hogan) dismissed Martin's intentional infliction of emotional distress claim, as well as her claims against former Dean Alice Gresham-Bullock and then University President Patrick Swygert in their personal capacities; however, the district court denied Howard's motion to dismiss Martin's sexual harassment, retaliation and breach of contract claims. Pet. App. A-19 – A-38.

After discovery and numerous motions, the district court granted, in part, summary judgment in favor of Howard on Martin's retaliation claim, narrowing that claim to two alleged adverse employment actions: the decision not to select her in December 1997 for the tenure-track position teaching equal employment opportunity (EEO) and labor law, and the purported "eviction" of Martin from her office in May 1998 when her two-year visitorship ended. The district court concluded that Martin's contention that Dean Bullock

had "converted" a possible Constitutional Law/Civil Rights Law class into a Tax Law class did not constitute an "adverse employment action," and thus, granted summary judgment against Martin on that aspect of her retaliation claim.

Trial before a jury began on April 4, 2006, and lasted for nearly four weeks. During her case-in-chief, Martin called as witnesses, among others, former Dean Bullock, Associate Dean for Academic Affairs Michael Newsom, all five law school faculty members on the Appointments, Promotions and Tenure ("APT") Committee responsible for recommending law school hires, including tenure-track positions. At trial, Chief Judge Hogan permitted Martin to discharge two separate attorneys and eventually represent (and conduct her own direct examination) *pro se*. Although he repeatedly expressed concern over her use of her allotted time, Chief Judge Hogan nevertheless repeatedly awarded Martin extra time to present her case.

After listening to the testimony of seventeen witnesses over thirteen days and considering over 150 exhibits admitted into evidence, the jury returned a verdict in favor of the University on all counts. Of particular significance, the jury concluded that Martin had not proven that Mr. Harrison's conduct was sexual in nature or "because of" Martin's gender. The jury also concluded that Martin had not proven that the APT Committee intentionally retaliated against her when it did not recommend her for the EEO/Labor Law tenure-track position, or that Dean Newsom's request that she vacate her office was an act of retaliation. Finally, the jury concluded that Martin had not proven that she had

a contractual right to remain employed at the law school when her two-year visitorship ended.

Martin filed post-trial motions for judgment and for a new trial which the district court, by Memorandum Opinion dated October 4, 2006, denied. *See* Pet. App. A-138 – A-158. As she did in her appeal (and now does again in her petition), Martin argued in her post-trial motions that the jury should have been instructed as a matter of law and/or as "law of the case" that Mr. Harrison's conduct was sexual in nature and was because of her gender. According to Martin, this instruction was compelled by the district court's ruling back in December 1999 denying the University's motion to dismiss the harassment count of Martin's complaint. In his post-trial Memorandum Opinion, Chief Judge Hogan explained in detail his reasoning for denying Martin's post-trial (and pre-trial) motions, including that his 1999 opinion denying Howard's motion to dismiss did not make factual findings, but merely concluded that Martin's complaint could not be dismissed before she had an opportunity to try to prove her case. Pet. App. A-145. Chief Judge Hogan reiterated that the question of whether Mr. Harrison's conduct was sexual in nature or because of Martin's gender was a factual question that needed to be presented to the jury to resolve. Pet. App. A-145 – A-146. In his post-trial Memorandum Opinion, Chief Judge Hogan found "no basis" for Martin's claim that he had previously taken judicial notice that Mr. Harrison's conduct was sexual in nature. Pet. App. A-145. Chief Judge Hogan went on to observe that Martin's arguments for judgment on her retaliation claim notwithstanding the jury verdict "border on frivolous," (Pet. App. A-150), and that Martin's

argument that the jury would have found Howard's reasons for not hiring her for the EEO/Labor Law position pretextual and false if given the chance "tenuous and speculative." Pet. App. A-153. Chief Judge Hogan found Martin's criticism of the jury instructions on what constitutes an adverse employment action "disingenuous and misleading." Pet. App. A-154. He admonished Martin for "wast[ing] time" discussing issues in her post-trial motions that the jury never even confronted or reached. Pet. App. A-155.

Although she was never a full-time member of the law school faculty or selected for a tenure-track position, Martin, on appeal, asked the Court of Appeals for the District of Columbia Circuit for "reinstatement, as a tenured, full professor, with back pay (including benefits and sabbatical)." Appellant Br. at 45. Following significant briefing – including an *amicus brief* from the National Association of Women Lawyers – the court of appeals affirmed. Pet. App. A-1 – A-12. Martin's motion for rehearing en banc was denied. Pet. App. A-13.

The University wishes to correct certain material factual misstatements in Martin's petition:

- The University *did not* recruit Martin as she alleges in her petition. Pet. App. 5. Rather, the evidence at trial was that Martin contacted the University in March 1995 stating that she wanted to leave her position at Cleveland-Marshall School of Law and return to the Washington, D.C. area due to problems her teenage daughter was experiencing at school and with her health. JEX 120.

- The University *did not* promise Martin that it would "convert" her visiting position into a tenure-track position when one became available as she alleges in her petition. Pet. App. 5. In fact, the jury rejected this assertion. The evidence at trial established that Martin knew – and acknowledged in her own contemporaneous written communications with Howard – that what the Law School (through Professor Taslitz) had offered her was a two-year visitorship with no guarantee of renewal. The jury specifically responded "NO" when asked the following on the jury verdict form:

> "Did the Plaintiff prove by a preponderance of the evidence that Professor Taslitz promised her employment with the University would continue after the expiration of her two-year visitorship, either by giving her a tenure-track position or by renewing her visitorship until a tenure-track position became available?"

Martin v. Howard University, et. al., No. 99-1175 (D.D.C. May 1, 2006) (Jury Verdict Form).

- Martin *did not* make satisfactory progress in her scholarship as she alleges in her petition. Pet. App. 5. Rather, the evidence at trial established that the Law School, all five members of the APT and even Martin herself were disappointed at Martin's failure to publish *any* scholarly writing during the two years she spent at the University. JEX 56; Trial Tr. 1189:7-1190:6 (JA 11983-11984),

1222:14-21 (JA 12016), 1225:2-15 (JA 12019) (Taslitz testimony); Trial Tr. 1004:1-1007:3 (JA 11798-11801) and 1043:9-16 (JA 11837); Trial Tr. 1004:8-1007:3 (JA 11798-11801) (Leggett testimony); Trial Tr. 1450:4-1452:9 (JA 12244-12246) (LaRue testimony); Trial Tr. 909:5-912:16 (JA 11703-11706) and 915:4-916:8 (JA 11709-11710) (Nolan testimony); Trial Tr. 570:6-15 (JA 11364) (Smith testimony).

- Mr. Harrison *was not* a "delusional, homeless, serial stalker with a criminal record" as Martin alleges in her petition. Pet. App. 5. Martin presented no evidence at trial to support this assertion.

- Martin was neither "fired" nor "replaced" as she alleges in her petition. Pet. App. 7, 11-12. Rather, the evidence at trial established that the University continued to employ Martin through May 15, 1998, the final date of her two-year visitorship, and even permitted her to occupy her office beyond that date to finish grading final exams and papers. JEX 32, JEX 107, JEX 108.

- The EEO position *was not* filled with "a less experienced, lower ranked" professor as Martin alleges in her petition. Pet. App. 7. Rather, the evidence at trial established that the APT unanimously recommended Professor e. christi cunningham, a talented scholar and graduate of the Yale Law School who was also an African-American woman, to fill the position. JEX 75 (JA

14044); JEX 78 (JA 14049); Trial Tr. 1043:9-16 (JA 11837) (Leggett testimony); Trial Tr. 1448:16-1451:7 (JA 12242-12245) (LaRue testimony); Trial Tr. 914:18-917:11 (JA 11708-11711) (Nolan testimony); Trial Tr. 569:13-570:15 (JA 11363-11364) (Smith testimony); Trial Tr. 1150:13-23 (JA 11944) (Taslitz testimony).

- Martin *was not* "abandoned" by her trial counsel as she alleges in her petition. Pet. App. 37-38. Rather, she fired not one, but two separate attorneys during trial. Pet. App. A-140, FN 1 ("The Court notes that during the trial Plaintiff discharged two different attorneys . . .").

Notwithstanding Martin's attempt to ignore or revise the factual record in this case, none of the 16 questions she has identified presents a persuasive reason to grant a writ of certiorari in this case.

REASONS FOR DENYING THE PETITION

This case presents no important question of federal law, nor any conflict with the decisions of this Court or any circuit court.[1] The court of appeals properly reviewed the decision of the jury and the district court in a manner consistent with the precedents of this Court and decisions of other circuits, and its conclusions are amply supported by the trial record in this case. Petitioner has improperly raised issues that were never before the jury or the courts below, and which cannot properly be raised

1. The Court of Appeals declined to revisit this appeal *en banc*. Pet. App. A-13.

now. Petitioner has raised no evidentiary or procedural issues tending to prove that the lower court has so far departed from the accepted and usual course of proceedings to require this Court to exercise its revisory power. Further review of petitioner's fact-bound challenge to the jury verdict is not warranted and the petition, therefore, should be denied.

1. The Court Of Appeals Correctly Affirmed The Sexual Harassment Verdict

In Question #14 of the 16 questions she asks this Court to review, Martin asks again whether the district court violated due process, the law of the case doctrine, or Rule 56(d)(1) when it asked the jury to resolve the disputed factual question of whether Mr. Harrison's conduct was "based on sex." Inexplicably, Martin (a licensed attorney) continues to believe that a statement made in the course of denying a motion to dismiss at the initial pleadings stage of a litigation had the legal effect of taking the factual determination of whether Mr. Harrison's conduct was "based on sex" away from the jury.[2] Martin is wrong, as has been explained multiple times during the course of this litigation, most recently in the court of appeals' decision affirming the jury's verdict:

> Ms. Martin now argues that the question of whether Harrison's behavior was based on

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2. Similarly, Chief Judge Hogan's reference to an EEOC regulation in the same 1999 opinion (see Pet. App. 20) did not take the question of whether Martin was sexually harassed away from the jury.

Ms. Martin's gender should not have been submitted to the jury, because it was decided in her favor in Chief Judge Hogan's 1999 opinion addressing Defendants' Motion to Dismiss or Alternatively for Summary Judgment. To bolster this argument, Ms. Martin points to a 2003 Magistrate Judge's Report and Recommendation stating that the trial judge had already "concluded that [t]he alleged harassment by Harrison of the plaintiff was based on her sex."

. . .

Martin obviously misinterprets the meaning of the District Court's denial of Appellees' Motion to Dismiss or Alternatively for Summary Judgment. At that stage of the litigation, the District Court assumed the accuracy of the facts alleged by Ms. Martin and, based on her allegations, decided that it could not find as a matter of law that appellees were entitled to judgment. In other words, Chief Judge Hogan found only "that Mr. Harrison's conduct could be considered sexual harassment" and, thus, properly rejected appellees' motion to take the issue from the jury. The language in the Magistrate Judge's Report and Recommendation is admittedly inartful, but it did not (and could not) countermand the holding of the District Court. In short, in submitting the question of whether Harrison's behavior was based on Ms. Martin's gender, the District Court did

> not violate the law of the case, nor did it act in a fashion that was contrary to its 1999 decision on this matter.

Pet. App. A-5 – A-6.

The question of whether Mr. Harrison's conduct was "based on sex" was properly before the jury, and based on the facts presented to it, the jury answered that question in the negative. There is no persuasive reason for this Court to review that factual determination.

In Question #3 of the 16 questions she seeks to present to this Court, Martin asks whether a plaintiff must prove that she was "groped" or "touched" in order to prove sexual harassment. However, that issue was not presented below, nor did it form a basis for any of the findings below. In insinuating that Chief Judge Hogan required her to prove that she was "groped" or "touched" to succeed on her sexual harassment claim, Martin mischaracterizes the record. Chief Judge Hogan *never* instructed the jury that it had to find "groping" or "touching" in order to find sexual harassment. In fact, the district court made clear that physical contact, such as "groping" or "touching" is *not* necessary to prove sexual harassment:

> Although specific actions [groping, touching, or making sexual advances] are not necessary for a finding of a hostile work environment, here it was reasonable for the jury to find that even considering the conduct that did occur, for example the content of Mr. Harrison's letters and voicemails, including his statement

> that he was looking for his wife, that his conduct was not sexual in nature and was not because of Plaintiff's gender.

Pet. App. A-147. Martin's misleading complaints about the district court's use of the words "groping" and "touching" in its Memorandum Opinion were briefed and argued on appeal and the court of appeals rightly found no abuse of discretion, and that the district court's jury instructions were proper and correct. Pet App. A-9 – A-10.

In Questions #4 and 5 of the 16 questions she raised in her petition, Martin argues there is (or should be) a *per se* rule that Mr. Harrison's conduct constituted sexual harassment. On pages 4, 13 and 23 of her petition, Martin states in conclusory fashion that the decision of the court of appeals creates a split in the circuits regarding civil rights issues, yet she fails to explain in detail what those issues are, and fails to cite to a single case in support of her contention. Martin even goes a step further to argue that other circuits have found *per se* harassment when presented with facts similar to those in this case, but again does not (and cannot) support that contention with any case law. The one case that Martin does cite – this Court's decision in *Oncale v. Sundower Offshore Svcs., Inc.*, 523 U.S. 75 (1998) – lends nothing to her argument. Consistent with *Oncale*, the jury in this case considered the unique facts presented, including the fact that Mr. Harrison mistakenly identified Martin as someone he thought he once knew, and the fact that Mr. Harrison had allegedly "stalked" *both men and women*. The difference in outcomes among the cases Martin relies on and the jury's verdict in her own case are simply the result of

applying the same, well-established legal standard to different facts. This case involved ample evidence from which the jury concluded that Martin had not proven that Mr. Harrison's conduct was "based on sex." As the court of appeals explained in affirming the jury's verdict:

> There was ample evidence — including the fact that Harrison had stalked at least one man in the past — from which the jury could have concluded that Harrison's conduct was not based on Ms. Martin's gender. Indeed, the jury reasonably may have concluded that Harrison's stalking was attributable to his misidentification of Ms. Martin as his wife, not bad behavior based on Ms. Martin's gender.

Pet. App. A-7 – A-8. Notably, the court of appeals determined that it did not have to confront the issue of whether stalking is *per se* sexual harassment:

> We need not decide whether and under what circumstances stalking might amount to harassment "based on gender." Rather, we merely hold that on the facts of this case, the jury's verdict must stand.

Pet. App. A-8. This Court need not (and should not) confront that issue either, at least not on the instant set of facts, or before the lower courts have fully explored the issue. Nothing in the lower courts' statements of the relevant legal standard or the application of that standard to the particular facts in Martin's case indicates any division among the circuits on the legal issue.

Martin, in essence, presses a fact-bound dispute over the sufficiency of evidence presented to the jury in this case. Further review of that claim is not warranted. Martin's petition for review of the jury's verdict on her sexual harassment claim should be denied.

2. The Court of Appeals Properly Reviewed The Disposition of Martin's Retaliation Claims

In Question #2 of the 16 questions she asks this Court to consider, Martin asks whether a victim of sexual harassment must use certain "magic words" to establish retaliation for reporting such harassment. In so doing, Martin again improperly mischaracterizes the record on appeal. The district court did not require Martin to prove to the jury that she had used certain "magic words" to report sexual harassment. On the contrary, the district court specifically instructed the jury that "*[t]here are no 'magic words' necessary* to invoke Title VII protection. It is enough to report the conduct constituting sexual harassment and to ask the employer to stop it." Trial Tr. 2401:3-6 (JA 13296) (emphasis supplied). The jury was never instructed that Martin had to use "magic words." The court of appeals rightly found that the district court's jury instructions were proper and correct. Pet App. A-9 – A-10.

At trial, Martin was given the opportunity to present evidence to the jury to try to prove that she had engaged in activity protected under Title VII. Among other evidence, the jury saw that, in her own letters and memoranda, Martin – a self-described "national EEO expert" – never alerted the University that she perceived Mr. Harrison's attempts to contact

her to be sexual harassment; instead she consistently referred to Mr. Harrison in her communications with the University as a "security problem." Pet. App. A-164 – A-181. The jury also heard testimony that Martin never invoked the University's anti-harassment policy. JEX 2 (JA 13479); Trial Tr. 786:17-788:6 (JA 11580-11582). On this record, it was reasonable for the jury to conclude that Martin *had not* engaged in protected activity or put the University on alert that she perceived Mr. Harrison's conduct to be sexual harassment. Martin v. Howard University, et. al., No. 99-1175 (D.D.C. May 1, 2006) (Jury Verdict Form).

In Question #6 of the 16 questions she asks this Court to review, Martin contends that the court of appeals erred in affirming the district court's dismissal of her claim that the University retaliated against her by allegedly "converting" a Constitutional Law/Civil Rights teaching position into a Tax position. Martin claims that the court of appeals' decision not to reinstate these retaliation claims violated this Court's decision in *Burlington Northern v. White*, 548 U.S. 53 (2006) and conflicts with decisions in other circuits. Pet. App. 32-33. Martin is incorrect.

As an initial matter, review of this issue is unnecessary because, as the court of appeals found, all of Martin's alleged retaliation claims were mooted "because the jury reasonably found that Ms. Martin had not engaged in protected activity" and therefore, "the necessary predicate for her claims of retaliation is missing." Pet. App. A-9. For this reason alone, Martin's petition should be denied.

Moreover, even if the jury had reached the question of retaliation, it was proper and in line with *Burlington* and other applicable decisions for the district court to narrow that claim because, as held in *Burlington*, Title VII "cover[s] those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." 548 U.S. at 57. The University's decision to hire a Tax professor instead of opening up the hiring process again to seek applicants to teach Constitutional Law/Civil Rights Law could not have dissuaded or deterred a reasonable law professor in Martin's shoes from engaging in protected activity. It was proven at trial that, in the fall of 1997, Martin had not even applied for the vacant Constitutional Law/ Civil Rights position, but only for the EEO/Labor Law position. Martin first applied for a Constitution Law/ Civil Rights position by memorandum dated March 6, 1998, months after the APT had made its decision to recommend Professor Cunningham (not Martin) for the EEO/Labor Law position. JEX 87, p. 1 (JA 14140) ("I recently learned from a friend at the Department of Justice (DOJ) that Reginald Robinson, [sic] (of DOJ) did not accept Howard's offer to fill the Constitutional Law/ Civil Rights position. Since presumably, this position is still unfilled, I ask that I be considered for it."). Based on the specific facts presented here, the district court correctly reasoned that no reasonable law professor in Martin's position in the Fall of 1997, when she alleges she had been harassed by a homeless man, would have been dissuaded from making a sexual harassment claim based on the fear that several months later, a teaching position for which she had never applied, never expressed an interest in filling, and never asserted she

was qualified to teach, might be unfilled in favor of filling an unanticipated teaching need.

In *Burlington*, this Court set a standard that is inherently factual in nature. While Martin may be disappointed that the lower court found that the alleged harm caused by the purported conversion of the Constitutional Law/Civil Rights Law teaching slot to a Tax Law slot was not adverse enough to be actionable, she cannot turn that disappointment into an alleged conflict with the decisions of this Court or other circuits. Here, the district court properly applied the correct legal standard to the facts. The court of appeals applied the correct legal standard in affirming the district court's grant of summary judgment. Further review is not warranted.

In her preliminary statement, Martin seems to be asking this Court to extend Title VII to "explicitly protect[s] an employee from being fired for being stalked."[3] Pet. App. 11. In so doing, Martin seeks to graft onto the federal anti-discrimination statute issues that are more properly within the purview of state common law, namely premises liability and workplace safety matters. Existing federal law properly protects employees from retaliation in response to reporting bona fide sexual harassment. Martin was simply unable to prove to the jury based on her unique set of facts that the University violated those laws.

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3. Even if such a statute existed, as discussed above, it would not apply to Martin because she was not fired. Martin had no contractual right to work at the University beyond May 15, 1998, the date her two-year visitorship ended.

3. Petitioners' Remaining Arguments Provide No Basis For Further Review

In Questions #1 and #10 of the 16 questions she seeks to present, Martin suggests that a disparate impact or wrongful termination theory should be applied to overturn the jury's verdict.[4] However, Martin did not present either theory in the case below. Because these theories were never before the jury or the trial or appellate courts, they should not be evaluated for the first time here. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). Moreover, the facts below would not have supported either theory given that the evidence at trial established that Mr. Harrison stalked both men and women and that Martin was never "terminated."

In Question #7 of the 16 questions set forth in the petition, Martin claims that the lower courts should have found a violation of the Age Discrimination Employment Act (ADEA), 29 U.S.C. § 621-634, *et seq.*, based on a witness' trial testimony regarding the APT's judgment in recommending Professor Cunningham, rather than Martin, for the open EEO/Labor Law position, in which the witness likened Martin to a "veteran" quarterback and Professor Cunningham to a promising "rookie." Martin's Complaint did not include an ADEA claim and at no point after the witness testified did she attempt

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4. Martin also states in this Question that "80% of stalking victims are women." The University notes that the percentage of female stalking victims was not a fact presented to or resolved by the jury or the courts below and Martin presents no evidence here to support her conclusory statement.

to amend her pleadings to include such a claim. The matter was never tried before the jury and was not properly before the Court of Appeals. *Singleton*, 428 U.S. at 120. The court of appeals did not err in rejecting Martin's belated attempt to add an ADEA claim to her case.

Finally, in Questions #8, 9, 12, 13, 15 and 16, Martin raises a variety of challenges to the evidentiary and procedural decisions the district court reached during trial, as well as other perceived affronts and general woes. All of these issues were before the court of appeals which found no abuse of discretion (Pet. App. A-9) and none are worthy of certiorari here:

- The district court had not yet taxed the University's litigation costs against Martin at the time of the court of appeals' decision. Because the court of appeals has not yet had a chance to address this issue, it is not proper to raise it for the first time in a petition of certiorari.

- The district court did not leave sanctions against Howard "forever in 'abeyance." In 2002, Magistrate Judge Facciola warned the University that it *could* be sanctioned with regard to its discovery responses. However, as Martin herself admits in her petition, no sanctions were ever ordered. There is no court order requiring Howard to pay any sanctions and therefore Martin is not entitled to any.

- The district court did not err in requiring Martin to formulate questions to herself (instead of narrating from the stand) after she fired two different trial attorneys during the course of the trial and insisted on conducting her direct examination herself. The district court has the discretion to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." Fed. R. Evid. 611(a). Here, the district court, in the sound exercise of its discretion, determined that Martin would not be permitted to testify in a narrative form, but rather, would be required to ask herself questions so as to preserve the University's ability to object to improper testimony.

- At no point did the University or its counsel commit perjury or fraud. In fact, the court of appeals denied both of Martin's voluminous motions seeking sanctions against the University and its counsel for what she claimed to be false statements made during trial, in the University's briefs and during oral argument before the court of appeals, and then directed the Clerk not to accept any further motions from Martin concerning sanctions or the reconsideration of sanctions. Pet. App. 14 – 16.

- Professor Gavil testified at trial and, obviously, Martin did not like what he had to say. However, the district court did not err in allowing this testimony. While Professor Gavil's deposition testimony was precluded at the summary judgment stage, there was no order precluding

him from testifying at trial. At trial, Martin objected to Professor Gavil testifying about her bad judgment and her objection was overruled. Trial Tr. 2214:23-2218:1 (JA 13109-13113). The district court's ruling on Martin's objection presents no legitimate basis for granting certiorari.

CONCLUSION

The lower court's decisions are consistent with this Court's precedents, decisions in other circuits and common sense. There is no legitimate reason – legal, evidentiary, procedural or otherwise – to revisit the district court's rulings or the jury's verdict in the case below. For all of the foregoing reasons, Martin's petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 08-204

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IN THE
SUPREME COURT OF THE UNITED STATES

DAWN V. MARTIN, ESQUIRE
Petitioner

v.

HOWARD UNIVERSITY,
HOWARD UNIVERSITY LAW SCHOOL
and
ALICE GRESHAM BULLOCK, ESQUIRE
Respondents.

ON PETITION FOR WRIT OF *CERTIORIARI*
TO THE UNITED STATES COURT
OF APPEALS FOR THE D.C. CIRCUIT

PETITIONER'S REPLY TO RESPONDENT HOWARD UNIVERSITY'S OPPOSITION TO PETITION FOR WRIT OF *CERTIORIARI*

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ARGUMENT

I. Howard University Distracts from the Precedent Setting Legal Arguments Presented by this Case by Blatantly Misrepresenting the Facts

Howard's legal arguments are difficult to find within the "muck and mire" of its flagrantly false representations of the record.[1] As the D.C. Court of Appeals cautioned, in another sex discrimination case brought by a Howard University professor:

> ...[a]n unscrupulous employer who has engaged in discriminatory practices may sometimes falsely depict a person with a legitimate complaint as a meritless troublemaker; the effects of the employer's wrongful conduct may them be compounded by the undeserved *ad hominen* condemnation of and calumny against a plaintiff who deserves better.

Carter-Obayuwana v. Howard University, 764 A.2d 779, 793 (D.C. 2001).[2]

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[1] Frederic D. Cooke, Esquire, representing Alice Gresham Bullock, filed a separate Brief. He did not join in Howard's misconduct. Prof. Bullock waived her right to file a Brief in Opposition to *Certiorari*. This Court's docket incorrectly indicates that Prof. Bullock is also represented by Roberta Y. Wright. In fact, Ms. Wright represents the *National Organization for Women* (NOW), the *National Association of Women Lawyers* (NAWL) and other women's advocacy groups that seek to late file an *Amicus* Brief in support of Ms. Martin's Petition for Certiorari.

[2] Howard has a pattern of long, "contentious" litigation with its employees. See, e.g., *Summers v. Howard University,* WL 751316 at *4, 5 (D.D.C. 2006) (finally settled).

"[A] lie is evidence of consciousness of guilt." *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1293 (D.C. Cir. 1998).

Ms. Martin cannot sacrifice legal arguments in order to correct all of the false statements or the "mudslinging" in which Howard continues to engage. This Reply Brief therefore focuses on the legal issues at stake for all women and Title VII plaintiffs generally.[3]

II. *Martin* Squarely Presents the Issue of whether Women can be Fired for being Stalked in the Workplace

A. The Disparate Impact Analysis should be Applied to Workplace Stalking

Howard claims that Ms. Martin cited no authority for arguing that stalking constitutes sexual harassment, as a matter of law;[4] however, she has cited *many* Title VII cases supporting this argument, including the holdings of this high Court in *Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977) (height and weight requirements discriminated on the basis of sex, based on their adverse impact on women) and *Oncale v. Sundower Offshore Services*, 523 U.S. 75, 118 (1998) (sex discrimination cases are established where offensive conduct affects "*primarily women*" even if it also affects some men).[5]

Courts have long recognized that stalking is one of the most egregious forms of sexual

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[3] Ms. Martin is compelled, however, to address Howard's baseless, irrelevant attack upon her daughter, who has established her own name as a published author and a university instructor, at the age of twenty-four.

[4] Howard Brief at 14-15. Howard then contradicts itself by acknowledging that she cited *Oncale*.

[5] Pet. at 11-12, 23.

harassment.[6] Howard argues that the D.C. Circuit's holding that Prof. Martin was not protected by Title VII was "fact bound" and did not present the Court with the issue of whether stalking is *per se*, sexual harassment. Howard's argument is simply illogical.

By holding that *stalking did not* constitute sexual harassment in this case, the D.C. Circuit *did* issue a ruling that stalking does not constitute sexual harassment, *per se*. Stalking cannot be sexual harassment *per se* for everyone *except* Ms. Martin.

Prof. Martin was stalked by Leonard Harrison in Howard's law school. Harrison was searching for the embodiment of a fictional female character in a book, written by Prof. Derrick Bell, to become his wife.[7] The jury specifically found that Harrison's harassment of Prof. Martin was severe and pervasive. Pet. 10; A-127. In fact, the jury found in Ms. Martin's favor with respect to *every* element of her claim except for the question of whether Harrison targeted her based on her gender. *Id.*

It was the jury's misunderstanding of the *legal definition* of sexual harassment -- not the facts -- that destroyed Ms. Martin's sexual harassment

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[6] Pet. at 22.

[7] Howard complains that Prof. Derrick Bell's affidavit should not have been included in the Appendix because it had no opportunity to cross-examine Prof. Bell; however, Howard never moved to strike it. The affidavit was part of the Appendix before the D.C. Circuit and in Ms. Martin's 2002 *Motion for Summary Judgment*, as well as post trial motions for judgment. Howard *elected not to depose Prof. Bell* and even filed a motion to preclude Prof. Bell from testifying at trial – which Judge Hogan granted. Prof. Bell's exclusion was one of the evidentiary issues that Ms. Martin appealed; thus, the affidavit was properly included in the Appendix.

and retaliation claims. It is therefore the law – not the facts -- that must be defined by this Court.

Martin can either stand as precedent, holding that a woman can be stalked in her workplace and fired for reporting it, or it can be reversed and set precedent that furthers the Title VII purpose of eliminating sexual harassment in the workplace -- whether the harasser is an employee or a non-employee workplace stalker. *Pet.* at 20-23.

B. Title VII Retaliation Cases do not Distinguish between being "Fired" and "Not Renewed"

Howard refused to address the cases cited by Ms. Martin, holding that whether a Title VII action "is considered a termination or a refusal to re-hire, ... it is a cognizable injury for the purpose of ... Title VII." *Walker v. Board of Regents of University of Wisconsin System*, 300 F. Supp. 2d 836, 853 (W.D Wis. 2004). Pet. at 8-9, fn. 9; 32.

The magistrate judge who dismissed Ms. Martin's retaliation claims treated her non-renewal as a "firing," a "dismissal," and "loss of her job" (A-92). *Pet.* at 32, fn. 32 (A-88) He also stated: "[p]laintiff lost her job and it was given to Cunningham." (A-82) *Id.* Howard simply ignored the case law, as well as the lower court holdings.

Howard improperly argues that Ms. Martin's retaliation claims are dependant upon her breach of contract claim. They are not. They are independent claims with different elements.

C. A Woman Stalked in her Workplace should not be Limited to Remedies under Negligence Law

Howard states:

> Martin seems to be asking this Court to extend Title VII to "explicitly protect[s] an employee from being fired for being stalked." Pet. App. 11.

Howard Brief at 18.

Howard has half-quoted and mis-cited Ms. Martin's Petition, which actually reads:

> There is no federal statute that explicitly protects an employee from being fired for being stalked.

Pet. at 11.

Howard argues that women stalked at work should be limited to the negligence remedies available under premises liability and workplace safety matters. *Id.* Howard cites no authority for its position; moreover, such limitations, in most states, would preclude any recovery where there was no *physical* injury. Many states fail to recognize any claim of *negligent infliction of emotional distress*, and where it is permitted, the cases are extremely difficult to establish.

The stalker would have to physically attack the victim before any claim would attach. Without a physical injury, the only injury would be the

emotional distress caused by stalking – or harassment, as stalking is defined.[8]

In addition, the common law has not recognized an anti-retaliation provision for reporting negligence; therefore, common law negligence would provide no remedy for a woman who was fired for asking for protection against a stalker .[9]

D. Judge Hogan Improperly Refused to Instruct Jurors that a Plaintiff Need not Use the Words "Sexual Harassment" to Invoke Title VII

Howard argues that Judge Hogan provided sufficient jury instructions when he told the jury that there were no "magic words" to invoke Title VII; however, these words alone lacked meaning, without context. Howard repeatedly argued that Ms. Martin's claim must be defeated because she entitled her memos "Security Problem on Campus" rather than "Sexual Harassment." Jurors needed to be told that it was not necessary for Prof. Martin to use the precise words "sexual harassment" to sustain her claim. Judge Hogan flatly refused to provide that instruction.

Howard refuses to acknowledge that complaints about harassment by non-employees are not reported or remedied in the same manner as harassment by employees. *Pet.* at 20-23.

Prof. Martin first reported Harrison's harassment to the administration, campus security, colleagues, and police verbally, on November 20th and

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[8] *Pet.* at 22.

[9] In some states, however, the law of wrongful termination, in violation of public policy, is evolving to fill the void where there is no statutory protection against termination. Pet. at 36.

21st. *Id.* She discussed it with administrators,[10] colleagues,[11] staff members[12] and law enforcement officers[13] who *all* readily recognized that Harrison's stalking was based on her status as a woman. *See Pl's Reply MJSexH* #483 at 1-7 (**JA**10,152-10,158). targeted. Stating what was obvious to all in her memoranda thereafter would have been like explaining to Dean Bullock that *water is wet*.

Prof. Martin's memoranda were not intended to be *legal Briefs* or to educate Dean Bullock (an attorney) on the law of sexual harassment. They were entitled "Security Problem on Campus" to focus on *eliminating the danger at hand*. Howard's Title VII liability attached only when it failed to take reasonable steps to keep Harrison out of the workplace. Prof. Martin could not have known that Dean Bullock was *not even trying* to protect her until she saw a pattern of *retaliation*, rather than the promised *protection*. Prof. Martin then worked *both* in fear of the stalker *and* of losing her job. Tr. #490 at 18:7-98:22 (**JA**12,489-12,569).

In *Maupin v. Howard County*, No. 13C05062062 (verdict July 2, 2007) (Howard County, Maryland Circuit Court), a call from a purported Ku Klux Klan member to an African-American high school teacher

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[10] *Pl's Facts* ¶38 (**JA**5815-5816); Pl's Tr. Exhibit 8B (**JA**14,407); Tr. #490 at 50:5-51:4 (**JA**12,521-12,522).

[11] Tr. 1666:2-15 (**JA**12,460); MJSex H at 13 (**JA**9,733), 17 #461, fn. 17 (**JA**9,737). Prof. Taslitz' comment that Prof. Martin would be "*raped* and killed" by Harrison if the matter were left up to campus security (*Id.*) even found its way into Prof. Martin's nightmares. Tr. #490 at 47:1-9 (**JA**12,518)

[12] MJSex H at 17 (**JA**9,737); Pl's MSJ #273 Ex. X Bruner depo at 137:4-13 (**JA**6,808).

[13] Pl's MSJ #273 Ex. P Sirleaf depo at 36:22-37:3 (**JA**6,658), 137:5-140:19 (**JA**6,698), 21:22-22:5 (**JA**6,652), 99:22-102:3 (**JA**6,683); *Pl's Opp to Def's MSJ* #283 at 4 (**JA**8,048).

was one factor creating a hostile work environment for her. *Id.* If employers are permitted to ignore threats from third parties, the harassed employee may be compelled to leave the workplace.

Such tactics are reminiscent of the school desegregation cases wherein African-American students were attacked by White supremacists and intimidated into leaving the schools they had integrated. It would be a sad irony if *Howard University* removed Title VII protection from plaintiffs like Ms. Maupin, threatened by racists in their workplaces. Similarly, an employer must not be permitted to rid itself of *women* by failing to protect them when they are threatened – as women -- in their workplaces.

III. Former Dean Bullock's Perjury Requires that the Jury's Verdict be Vacated

In her July 1, 1999 memorandum, Dean Bullock admitted that she understood that Harrison was targeting *women* to "stalk" and "otherwise harass." (Pet. A-196) Her trial testimony to the contrary constitutes perjury. For *the first time*, Howard denies that Prof. Bullock committed perjury at trial. In the D.C. Circuit, Prof. Bullock actually responded to the charge of perjury by arguing that *perjury does not constitute fraud upon the court!* [14] (Bullock Brief at 15) Prof. Bullock specifically waived her right to file an Opposition to Certiorari. Howard cannot make new factual assertions and denials at the Supreme Court level.

Where a party has committed perjury, "there can be no doubt that the judgment was unfairly

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[14]*See Pl's Rep*ly MJSexH (#483) at 1-3 (**JA**10,152-10,1554); Pl's Reply MJRet (#489) at 2-4 (**JA**10,244-10,246).

obtained...." *Devon Distributing Corp. v. Minor,* 2007 WL 4348069 at *4 (S.D. Iowa 2007). Accord, *Evans v. Commercial Bank and Trust Co.,* 2003 WL 22871619 (Bankr. W.D. Tenn 2003); *United Coin Meter Co. Evans v. Commercial Bank and Trust Co.,* 2003 WL 22871619 (Bankr. W.D. Tenn 2003); *Seaboard Coastline R.R.*, 705 F.2d 839, 844-845 (6th Cir. 1983); *Abrahamsen United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 844-845 (6th Cir. 1983); *Trans-State Exp., Inc.*, 92 F.3d 425, 428 (6th Cir. 1995), as modified by *Jordan v. Paccar, Inc.*, 1996 WL 528950 (6th Cir. 1996).

This wrongly procured verdict must be vacated.

IV.Howard Fails to Acknowledge that Judge Hogan's 1999 Decision Resolved a Motion for Summary Judgment, Determining Facts

Howard's Brief, at 11, states:

> ... Martin asks again whether the district court violated due process, the law of the case doctrine, or Rule 56(d)(1) when it asked the jury to resolve the disputed factual question of whether Harrison's conduct was "based on sex." Inexplicably, Martin (a licensed attorney) continues to believe that a statement made in the course of denying a motion to dismiss at the initial pleading stage of litigation the legal effect of taking the factual determination of whether Mr. Harrison's conduct was "based on sex" away from the jury. Martin is wrong...

"Inexplicably," Howard's counsel, a partner in Venable, LLC, a major EEO defense law firm,

refuses to acknowledge that Howard's 1999 motion was both a motion to dismiss *and for summary judgment*. He further *mocks Ms. Martin* for *understanding* this fact and applying Rule 56(d)(1).

Judge Hogan's 2006 *conclusory statement about what said in 1999* is not evidence of *what he actually said in 1999. The proof of what Judge Hogan said in 1999 is the 1999 opinion itself.* In 1999, based on the undisputed facts, Judge Hogan properly determined that Harrison's harassment of Prof. Martin was sexual in nature and/or based on her gender. 1999 U.S. Dist. LEXIS 19516 (D.C.D.C. 1999) at 8-11 (A-25-28).

Howard quotes Judge Hogan 2006 statement that Ms. Martin's arguments "border on the frivolous" because she had previously raised them and lost (2006 U.S. Dist. LEXIS 34446 at *5, A-150); however, they were not frivolous simply because she lost them. The dismissal was erroneous when it was decided in 2003 and for additional reasons, based on cases decided thereafter. *Pet.* at 32-33.

Chappelle-Johnson v. Powell, 440 F.3d 484 (D.C. Cir. 2006) upheld a retaliation case where the plaintiff was deprived of the *opportunity* to compete for a position. Prof. Martin was similarly deprived of *an opportunity to be considered* for a position because Dean Bullock withheld and concealed vacancies. *See also Wiley v. Glassman,* 2007 WL 4354431 at * 4 (D.C. Cir. 2007) (radio station excluded plaintiff radio broadcaster from the managing editor rotation); *Holcomb v. Powell*, 433 F.3d 889, 902 (D.C. Cir. 2006); *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006); *Mastro v Potomic Electric Power Company*, 447 F.3d 843, 855 (2006).

Ms. Martin's *Motion for Summary Judgment* on these issues was *never considered* on the merits.

This dismissal should be reversed. If these claims are considered and restored, Ms. Martin is entitled to judgment, as a matter of law, for the reasons stated in her MSJ at 41-44 (**JA**5,798-5,801).

Howard claims that Prof. Martin was not "a full time professor" at Howard. Ms. Martin was a *full-time Visiting Associate* Professor at Howard, with a full course load. Her 1997-1998 salary was $83,000 per year, plus a $3,000 summer grant, for a total salary of $86,000, with health, life and retirement benefits. She had a faculty office, office hours, faculty meeting obligations, full faculty voting rights, committee obligations and publishing obligations. JEXs 24 (**JA**13,749) 28 (**JA**13,758), 29 (**JA**13,760), 32 (**JA**13769), 33 (**JA**13,770), 35 (**JA**13,771), 47 (**JA**13,788), 65 (**JA**14,000). This was not a "part-time" or "adjunct" position.

Even if Prof. Martin had not been a full time faculty member, she would be entitled to reinstatement -- or appointment -- to a position as a full-ranked, tenured Professor. The junior, lower ranked *Visiting Assistant* Professor, christi cunningham, who was selected for the position, is now a tenured, full-ranked Professor. JEX 4 at 9013 (**JA**13,635), 9028 (**JA**13,650). The relief that Ms. Martin requests is precisely the "make whole" relief necessary to place her in the position that she would hold today, but for the illegal retaliation.

V. Howard Misrepresents the Character of Ms. Martin's Daughter, at Age Eleven

In its Brief, at 7, Howard has even stooped so low – *again*-- as to mischaracterize an *eleven year old girl* with respiratory problems as a "teenager with problems in school and with her health." Prof. Martin's March 12, 1995 letter actually states that

her daughter is *eleven years old child* with allergies and sinus problems aggravated by Cleveland winters.[15]

Moreover, Prof. Martin's March 12, 1995 inquiry is irrelevant to any issue in this case. It had no bearing on how she was hired for the 1996-1997 academic year – and certainly has no bearing on why she was "not renewed" in 1998. All of Howard's witnesses testified that Howard recruited Prof. Martin when she participated in the November 1995 AALS Recruitment Conference, where she had interviews at other schools, for positions for the 1996-1997 academic year.

Ms. Martin corrected Howard's misrepresentations in her D.C. Circuit March 11, 2008 *Motion for Sanctions* at 12, Exhibit A, at 22-27; yet Howard and its attorneys continue to viciously misrepresent not only Ms. Martin's character, but even that of her little girl. Howard continues to superfluously inflict additional injury upon Ms. Martin and her family – without conscience or ethics -- because no court has yet held them accountable for it. Ms. Martin's daughter is *an extraordinary young woman* in her own right.[16] Howard should not be permitted to malign her childhood character with impunity.

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[15] JEX 120 (**JA14,253**).

[16] Danielle is now a published author, teaching at a university herself, at age 24. Her credits are described by Collins Literary Agency, at http://www.marcovigevani.com/upload/london_2008/Collins_Literary_London_2008_Rights_List.pdf, as well as numerous other websites. One of her short stories is included in the 2008 Anthology of Best American Short Stories, edited by Salmon Rushdie.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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No. 08-204

IN THE
SUPREME COURT OF THE UNITED STATES

DAWN V. MARTIN, ESQUIRE
Petitioner

v.

HOWARD UNIVERSITY,
HOWARD UNIVERSITY LAW SCHOOL
and
ALICE GRESHAM BULLOCK, ESQUIRE

Respondent.

ON PETITION FOR WRIT OF C*ERTIORARI*
TO THE UNITED STATES COURT
OF APPEALS FOR THE D.C. CIRCUIT

AMICUS BRIEF OF THE NATIONAL
ORGANIZATION FOR WOMEN (NOW),
ET AL., IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OUT OF TIME

Amici, The National Organization for Women (NOW), The National Association of Women Lawyers ("NAWL"), Peace at Work and additional *Amici* listed in the Appendix, file this motion for leave to file *Amicus Curiae* Brief out of time. While *amicus briefs* were due September 16, 2008, counsel for *Amici* became ill and temporarily unable to complete the Brief in time to circulate it to the various *Amici* for comment and revisions. Despite counsel's best efforts, given the work involved in preparing the brief, as well as commitments in counsel's regular practice, *amici* were unable to file until this date. The *amici* have the full support and consent of Petitioner's counsel, and do not believe that any prejudice will result to Respondent from this delay. The *amici* all share a common interest in protecting the rights of stalking victims, who are predominately women, and in ensuring that the employers of these victims fulfill their obligations to provide a safe, productive work environment that is free from threats of stalking and retaliation against stalking victims.

Through this brief, the *Amici* illustrate, within the bounds of applicable law, an employer's responsibility for the actions of those whose conduct creates a patently unsafe, hostile working environment resulting in both psychological and physical assaults of disastrous proportions. Absent such responsibility, stalking victims will have little to no recourse for such blatant retaliation for doing nothing more than "working while female" and being stalked.

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This Brief is filed in support of Petitioner, Dawn V. Martin, Esquire.

THE INTERESTS OF *AMICI CURIAE*

The National Organization for Women (NOW) [1]

The National Organization for Women (NOW) is the largest, most comprehensive feminist advocacy group in the United States. NOW's purpose is to take action to bring women into full participation in society — sharing equal rights, responsibilities and opportunities with men, while living free from discrimination. NOW has an interest in promoting safety of women in the workplace and in eliminating gender-based discrimination.

The National Association of Women Lawyers (NAWL)

The National Association of Women Lawyers (NAWL) is the oldest women's bar association in the United States. NAWL works to advance the rights of women and to end discrimination and violence against women. NAWL acts as *Amicus Curiae*, and advises legislators and policymakers. NAWL members serve as delegates and liaisons to national and international organizations in its pursuit of justice for women. NAWL has an interest in promoting safety of women in the workplace and in eliminating gender based discrimination.

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[1] As required by Rule 37.6 of this Court, counsel for *Amici* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *Amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief. Petitioner Dawn Martin consents to the filing of this Brief. Respondents have not provided written consent to the filing of this Brief, but have not indicated that they oppose its filing.

Additional *Amici*: see Appendix.

INTRODUCTION

The record herein establishes the following facts:

1) Prof. Dawn Martin was stalked in her workplace, *Howard University Law School*, by Leonard Harrison, a delusional serial campus stalker, with a history of violence.

2) Harrison pursued Prof. Martin to be his "wife," based on his assertion that she bore professional and physical similarities to a *fictional* character in a book written by renowned Prof. Derrick Bell;

3) Prof. Martin reported Harrison's conduct to the law school administration, the D.C. Metropolitan Police Department and campus security, asking for protection on campus;

4) Law School Dean Bullock assured Prof. Martin in writing that she was discussing the matter with the Director of Campus security, but never did so; nor did she take any action to prevent Harrison from entering the law school premises;

5) Howard University failed to follow its own procedures for addressing stalking on campus, so that the stalker freely reached Prof. Martin's office;

6) Less than a month after Prof. Martin reported the harassment, Howard's administration decided not to renew her teaching contract;

7) Howard continued to reject Prof. Martin from any position, permanent or visiting, for the remaining six months of her tenure at Howard, although there were three vacant positions for which Prof. Martin was well qualified; and

8) Dean Bullock concealed vacancies from the

Appointments Committee, even when a member of that committee specifically asked whether there was any vacancy for which Prof. Martin could be considered.

On April 18, 2006, the jury found, as Prof. Martin alleged, that Harrison's actions *did* create a "hostile work environment" for her. The jury further concluded that Howard failed to take reasonable steps to end it. Despite these findings, Martin was denied recovery because the jury concluded that Harrison's harassment was not "*sexual*" in nature nor based on Prof. Martin's gender, so her complaints were not "protected activity" within the meaning of Title VII of the Civil Rights Act of 1964, *et seq*. So even if Howard retaliated against her for reporting the stalking, Prof. Martin was deprived of her cause of action.

Such a result leaves women in this jurisdiction with no clear remedy at law for harassment by a stalker in their workplaces nor for being terminated in retaliation for complaining about it.[3]

For this reason, this Brief concurs with Prof. Martin's argument that the dismissal of her retaliation claims requires restoration pursuant to *Burlington Northern v. White*, 548 U.S. 53 (2006), and that she is entitled to judgment on her sexual harassment and retaliation claims.

The arguments below detail the impact of a decision adverse to Prof. Martin on the broader issues of sexual harassment and retaliation confronting women in their workplaces and

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[3] Although Prof. Martin was stalked by a stranger, this Court's decision will also affect victims of domestic violence. Domestic violence does not necessarily stop at the front door, but often overflows into the workplace.

campuses.

SUMMARY OF ARGUMENT

Leonard Harrison's stalking of Prof. Martin constituted harassment based on sex/gender, thereby invoking Title VII. Title VII prohibits harassment based on sex or gender. *Oncale v. Sundowner Offshore Services,* 523 U.S. 75, 118 S. Ct. 998, 1001, 140 L.Ed. 2d 201 (1998).

Stalking has been recognized as a severe form of sexual harassment. *Turnbull v. Topeka State Hospital,* 255 F 3d 1238 (10th Cir. 2001). A supervisor's subjective determination that stalking is not sexual in nature or based on sex ignores the fundamental nature thereof. P. Mullen and M. Pathe, *Stalking,* 29 Crime 272 (2002).

Employers are obligated to understand their duties under Title VII. If a supervisor can simply claim that he or she did not realize that the conduct complained of constituted sexual harassment, it will be in the employers' interests *not* to educate its managers regarding conduct that constitutes sexual harassment so they can all claim "ignorance" when a woman files a sexual harassment charge.

A single act of accosting a man should not insulate a harasser (or the employer) from a claim that subsequent gender-specific harassing behavior toward a woman is in fact gender-based. DC ST §22-404(b). Nor does the serial stalker's lone confrontation with a man affect the sex-based nature of his stalking of Prof. Martin.

A harasser's use of gender-specific criteria to select the target of his stalking establishes that the harassment is "based on sex." By analogy to "sex-plus discrimination" cases, this kind of gender profiling violates Title VII. *Abraham v. Graphic Arts*

International Union, 212 U.S. App. D.C. 412, 660 F. 2d 811 (D.C. Cir 1981). The use of a gender- specific character to locate a victim is based on sex.

Sexual assault or express solicitation of sexual acts need not be shown to establish hostile environment sexual harassment. *Ellison v. Brady*, 924 F 2d 872, 880 (9th Cir. 1991).

Adverse action that affects future employment opportunities is actionable retaliation under *Burlington Northern v. White*, 126 S. Ct. 2405 (2006) and its progeny.

The clear public policy interest in preventing crime argues for a theory of protection for victims of workplace violence. *Franklin v. Monadnock Co.*, 151 Cal. App. 4th 252 (Cal.2007).

The imposition of Court costs on good faith claimants chills the pursuit of the objectives of Title VII. *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 127 S. Ct. 2162 (2007).

ARGUMENT

I. Harrison's Stalking of Prof. Martin Constituted Harassment Based on Sex/Gender, Thereby Invoking Title VII

A. Stalking Has Been Recognized as a Severe Form of Sexual Harassment against Women

Courts have long recognized that stalking is one of the most egregious forms of sexual harassment. *Crowley v. L.L. Bean*, 303 F.3d 387, 396, 401-403 (D. Me. 2002) (plaintiff identified the harasser's conduct as "stalking" and had therefore met her burden of demonstrating that she perceived the harasser to have created a "hostile or abusive environment"); *Frazier v. Delco Electronics Corporation*, 263 F.3d 663, 668 (7th Cir. 2001)

(stalking recognized as creating a hostile work environment); *Whitmore v. O'Connor Management, Inc.*, 156 F3d 796, 798 (8th Cir. 1998) (sexual harassment was so severe that co-worker would "almost call it stalking"); *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1108 (8th Cir. 1998) (plaintiff felt that her co-worker "was harassing her, actually, stalking her"); *Angeles-Sanchez v. Alvarado*, 1993 U.S. App. LEXUS 10509 (1st Cir. 1993) (sexual harassment/hostile work environment included "stalking"); *Spina v. Forest Preserve District of Cook County*, 207 F. Supp. 764, 772 (D. Ill. 2002) ("stalking" listed as one of the more severe allegations of sexual harassment); *Ramirez v. New York Presbyterian Hospital*, 129 F. Supp. 2d 676, 678 (S.D.N.Y. 2001) (plaintiff used "stalking" to describe acts of sexual harassment/hostile work environment); *Dolman v. Williamette University*, 2001 U.S. Dist. LEXIS 7772 (D. Or. 2001) (professor stalked by a former student was sexually harassed); *Chontos v. Rhea and Indiana University*, 29 F. Supp. 931, 937 (N. Dist. Ind. 1998)[3] ("stalking" was one of the most "disturbing" acts of sexual harassment).

B. A Serial Stalker's Lone Confrontation with a Man Does Not Affect the Sex-Based Element of His Stalking of Women

Judge Hogan's October 4, 2006 decision justified the jury's finding that the stalking was not gender-based by referring to Harrison's single confrontation seven years earlier with a renowned African-American male professor, Prof. Derrick Bell, at Harvard University Law School. (*See* 2006 WL 2850656 at

[3] This lawsuit was filed against University under Title IX, rather than Title VII of the Civil Rights Act of 1964.

*4, (Pet. A-146). However, neither Howard's administrators nor Prof. Martin even knew that Harrison confronted Derrick Bell until 1999 – a year after Prof. Martin left Howard.

Harrison's one-time confrontation of Prof. Bell in 1990, therefore, should not serve as evidence that Howard's officials believed that Harrison was an equal threat to men and women, or an "equal opportunity harasser." Harrison was not an ongoing threat to Bell. Harrison only confronted Prof. Bell as a means of locating his next *female* stalking victim. Significantly, Harrison's confrontation of Prof. Bell cannot be considered stalking by any definition, as a pattern of behavior is a necessary requirement of stalking.[4]

In 1997-1998, when Prof. Martin was complaining of Harrison's stalking, neither Howard nor Prof. Martin had any reason to believe that Harrison had harassed any man, at any time. In fact, Harrison's letters expressly identified numerous women that he had targeted, over a period of years, to be his "wife." It is not possible, then, that Howard could have perceived Harrison as an "equal opportunity harasser" at the time Prof. Martin requested protection from him. To argue that one who commits ongoing acts of female gender based harassment would never commit an aggressive act against a man is as ludicrous as it is irrelevant.

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[4] DC ST § 22-404 (b) states that "Any person who on more than one occasion engages in conduct with the intent to cause emotional distress to another person or places another person in reasonable fear of death or bodily injury by willfully, maliciously, and repeatedly following or harassing that person, or who, without a legal purpose, willfully, maliciously, and repeatedly follows or harasses another person, is guilty of the crime of stalking."

Harrison's confrontation with Bell was not a gender-based act against Bell although his purpose was gender-based: to locate a woman to be Harrison's "wife" based upon Bell's fictional character of Geneva Crenshaw.

Under the rationale set forth by the district court, an employer can invalidate a woman's Title VII protections by producing evidence that the sexual harasser demonstrated violent or threatening behavior toward any male, at any time in his life. The broad implications of this new legal edict could seriously thwart future sexual harassment claims. For example, one could argue that, since John Hinkley shot at President Ronald Reagan – a male -- on March 31, 1981, his stalking of actress Jodie Foster while she was an undergraduate student at Yale University was not based on sex, although he professed his "love" for her in letters and phone calls – as did Harrison in letters and phone calls to Prof. Martin.

A sexual harasser may have exhibited violent or other threatening behavior at some point in his life. This prior act neither diminishes nor negates sex-based harassment, such as stalking.

C. Title VII Protection Should Not Depend Upon the Employer's Subjective Belief of What Conduct Constitutes Sexual Harassment

In 1999, Judge Hogan concluded:

> In this case, it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female. Therefore, the alleged stalking activities do appear to

> have been "because of sex" even if they were not inherently sexual in nature.

Martin, 1999 U.S. Dist. LEXIS 19516 at *11. (Pet. A-27)

On October 4, 2006, however, Judge Hogan held that he had not concluded, in 1999, that Harrison's harassment was "sexual in nature" or "based on sex."

> [T]his Court never found that Mr. Harrison's conduct was sexual in nature or because of Plaintiff's gender, but left this as a question for the jury. The jury verdict did not, therefore, contradict the Court's 1999 decision.

Martin, 2006 WL 2850656 at *3 (D.D.C.). (Pet. A-146)[5]

The only evidence before the jury indicating that Harrison's conduct was not sexual in nature was the testimony of Dean Alice Gresham Bullock stating that she did not perceive Harrison's conduct to be based on sex or sexual in nature.[6] Employers should not be permitted to escape liability for Title VII retaliation by claiming "ignorance of the law" – which would not even be a valid excuse in criminal proceedings.

The district court's 2006 decision and the jury's verdict make it possible for an employer to

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[5] Prof. Martin's Petition characterizes the District Court's submission of whether Harrison's harassment was based on sex to the jury as violating "the law of the case."

[6] *But see* Ms. Martin's Petition, explaining that, in a Memo to Howard's General Counsel, Dean Bullock stated to the contrary.

escape Title VII liability simply by stating that the employer's officials did not understand that the reported conduct constituted sexual harassment.

Employers cannot ignore stalking harassment of women as a gender based activity by simply disregarding the fundamental nature of stalking as a tool to control women. While stalking can affect men, the vast majority of stalking victims are female.[7] At least eighty percent of stalking victims are female.[8] Ninety-four percent of the female stalking victims identified their stalkers as being male.[9]

Employers are obligated to understand their duties under Title VII. If a supervisor can simply claim that he or she did not realize that the conduct complained of constituted sexual harassment, it will be in the employers' interest *not* to educate its managers regarding conduct that constitutes sexual harassment so they can all claim "ignorance" when a woman files a sexual harassment charge. Whether or not a woman is protected from termination by Title VII must not depend upon the purported level of knowledge of any particular supervisor.

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[7] P. Tjaden and N. Thoennes, *Research in Brief*, National Institute of Justice Centers for Disease Control and Prevention, (April 1998)

[8] *Id.*

[9] *Id.*

D. Where Gender Specific Language is Used to Identify and Target the Harassment Victim(s), the Harassment is "Based on Sex"

Where a harasser targets a woman because he fantasizes that she is related to him in sex-specific terms, such as "wife," "mother," "sister," "aunt," "grandmother," the target can only be a woman. The very words used by Harrison clearly identified his victims in terms that required them to be female.

The jury recognized this, but were clearly confused by the jury verdict form question 1c, which asked the jurors whether Harrison's conduct was sexual in nature or because of plaintiff's gender. The jury sent out a question:

"Wives are typically female. Is 1c an automatic 'yes' just because plaintiff is female." The court's reply was "No, it is not an automatic 'yes.' You must base your decision on the evidence presented to you." Thus it appears that the jury was led to believe that Harrison's pursuit of Prof. Martin as his "wife" was insufficient standing alone to establish the gender-based nature of the stalking, and that they needed additional proof of that element. Indeed this was the only element on which the jury did not find for Prof. Martin.

From the evidence, Harrison's harassment was clearly based on sex. The contrary finding by the jury, which disregards critical evidence, deprived the plaintiff of a remedy, and also offends the struggle of women to be safe in the workplace.

E. "Gender Profiling" as a "Sex-Plus" Factor in Sex Discrimination

Amici urge the adoption of a "gender profiling" analysis as part of employment law. "Gender

profiling" is closely related to the long recognized doctrine of "sex plus" employment discrimination.

Prior to *Martin*, Judge Hogan had recognized that "sex-plus" basis discrimination violates Title VII:

> Disparate treatment of subclasses of women, based on an immutable characteristic or the exercise of a fundamental right, has been held unlawful under Title VII; e.g. *Abraham v. Graphic Arts International Union*, 212 U.S. App. D.C. 412, 660 F.2d 811 (D.C. Cir. 1981) (leave policy did not accommodate pregnancy and hence was unlawful gender discrimination under Title VII). *Judge v. Marsh*, 649 F. Supp. 770, 779-780 (D.D.C. 1980).

In a "sex-plus" case, an employer does not discriminate against a protected class as a whole; rather it treats a subclass within a protected class disparately. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (employer treated women with children of preschool age differently than men in similar circumstances); *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971) *cert.* denied, 404 U.S. 991 (sex plus marriage violated Title VII, where airline hired married male flight attendants but not married female flight attendants).

Most sexual harassers have personal preferences and do not harass every woman they meet. In this case, Leonard Harrison targeted women based on their profession – particularly female academics addressing civil rights issues. Harrison did not similarly pursue male civil rights professors to be his "wife."

F. Where a Gender Specific Character is Used to Identify the Harassment Victim, the Harassment Constitutes "Gender Profiling"

Only a woman could be "Geneva Crenshaw." Where the harasser selects the victim based on his obsession with a female character, real or imagined, the harasser has selected the victim based on the basis of her gender. Although the harasser may need to see additional qualities in particular women in order for him to cast her in the role he has chosen for her, one constant requirement for the role is that she be female. The harassment is, therefore, necessarily based on sex and invokes Title VII.[10]

G. A Sexual Harassment Claim Does Not Require that the Harasser Sexually Assault the Victim or Expresaly Solicit Sexual Acts

Judge Hogan offered a rationale for the jury's failure to conclude Harrison's harassment was based on gender:

> The jury did not hear or see evidence that Mr. Harrison's conduct involved conduct typical of sexual harassment such as groping, touching or making sexual advances.

Martin v. Howard University, 2006 WL 2850656 at *4 (Pet. A-146)

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[10] As discussed in the Martin Petition, harassment based on "character profiling" could just as easily be based on racial profiling, or on the basis of national origin, color, religion, age or disability.

Amici contend that the enunciation of such a standard ignores the increased understanding of sexual harassment, and the gains made by working women during the past several decades. As established herein, stalking is a form of sexual harassment, and a plaintiff is not required to prove that she was "touched," "groped," or sexually assaulted to establish a sexual harassment claim.

Even intended compliments can constitute sexual harassment—a fact that Judge Hogan explicitly acknowledged in his 1999 decision. *See, Martin*, 1999 LEXIS 19516 at *12-13. (Pet. A-29) *Accord, Ellison v. Brady*, 924 F. 2d 872, 880 (9th Cir. 1991), wherein a male subordinate wrote love letters strikingly similar to those Harrison wrote to Prof. Martin and the Court held that the fear of receiving a "bizarre note from...a person she barely knew...," and "not knowing what this mentally unstable person would do next," was enough to create a hostile work environment for the plaintiff.

See also, Fuller v. City of Oakland, 473 F.3d 1523 (9th Cir. 1995), wherein a female police officer trainee was harassed by her ex-boyfriend, a more senior police officer. The sexual harasser did not touch plaintiff or threaten her; nor did he say anything to her that was overtly sexual; however, the context of the conduct and the history of the relationship indicated that the harasser wanted the plaintiff to be his girlfriend again. The court therefore defined the conduct as sexual harassment.

If harassment is "sexual in nature" where the harasser wants the victim to be his "girlfriend," then it must also be sexual in nature in the instant case, where the harasser takes it a step further, targeting the victim to be his "wife."

H. Pursuant to the Disparate Impact Theory, Stalking Constitutes Harassment on the Basis of Sex

Even when conduct might affect both men and women, the conduct may constitute harassment on the basis of sex if it disproportionately affects women. *Turnbull*, 255 F.3d at 1244; *see also Crist v. Focus Homes*, 122 F.3d 1107, 1111 (8th Cir. 1997).

Statistics compiled by the U.S. Department of Justice reflect that women are disproportionately affected by workplace violence, such as sexual assault and stalking. *See* Bureau of Justice Statistics, *National Crime Victimization Survey, Violence in the Workplace*, 1993-1999 (December 2001), at www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf.

Not only are at least Eighty (80%) percent of stalking victims female[11] (*Id*, Tjaden and Thoennes) but, according to the U.S. Department of Justice, 1 in 12 females versus 1 in 45 males will be stalked. .

Where a woman is stalked in her workplace, the disparate impact analysis should be used in determining if the harassment is based on sex.

II. The Dismissal of Prof. Martin's Retaliation Claims Violates *Burlington Northern v. White*

Prof. Martin alleged that her employer failed to renew her teaching contract and cancelled, withdrew and/or concealed several vacant and

[11] Some of the targeted men are actually the boyfriends of women who are the real focus of the stalker; thus, the stalking of the man is simply part and parcel of the stalker's harassment of the woman. Even where a woman stalks a man, the stalking is generally "sexual in nature" or based on her desire to have or continue a sexual or romantic relationship with him. Thus, nearly all stalking is either "sexual in nature" or based on sex.

advertised faculty positions in order to remove her from the faculty because she asked for reasonable steps to be taken to stop a delusional stalker from pursuing her, in her workplace. In 1999, Judge Hogan refused to dismiss these retaliation claims,[12] but on October 20, 2003, Magistrate Judge Facciola dismissed them, holding:

> Title VII applies only to ultimate employment decisions such as hiring or discharging....

Martin, 2003 U.S. Dist. LEXIS 18501 at *31-32 (D.D.C. 2003) (Pet. A-31).

In June of 2006, this high Court decided *Burlington Northern v. White*, 126 S. Ct. 2405 (2006). *Burlington* expressly rejected the analysis set forth by MJ Facciola, who limited actionable retaliation to "ultimate employment decisions." 548 U.S. 53 (2006). Instead, the Court held:

> ...the proper formulation requires a retaliation plaintiff to show that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

548 U.S. at 64.

Even before *Burlington*, the D.C. Circuit decided a stream of cases elucidating the definition of "adverse action" within the meaning of Title VII. *Holcomb v. Powell*, 433 F.3d 889, 902 (D.C. Cir. 2006) held that adverse actions included acts that

[12] 1999 U.S. Dist. LEXIS 19516.

affected future employment opportunities. *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006), held that Title VII makes unlawful any act of retaliation by an employer that might dissuade a reasonable employee from making or supporting a charge of discrimination pursuant to Title VII – whether it is related to current employment opportunities, future employment opportunities, or even potentially adverse consequences completely unrelated to employment. *Burlington* expressly adopted the standard for proving actionable retaliation set forth in *Rochon*. 26 S. Ct. at 2411, 2413, 2415.

Chappelle-Johnson v. Powell, 440 F.3d 484 (D.C. Cir. 2006), held that it is not necessary that the plaintiff "show that the position remained open and that the employer continued to seek applicants." It was enough that the plaintiff alleged that the employer "denied her an opportunity for advancement." *Mastro v. Potomac Electric Power Company*, 447 F.3d 843, 855 (D.C. Cir. 2006), held that the failure to permanently fill a vacancy could violate Title VII if the position was eliminated for discriminatory reasons. This Court's decisions were consistent with *Terry v. Gallegos*, 926 F. Supp. 679, 710 (W.D. Tenn. 1996), holding that a vacancy cancellation constituted actionable retaliation under Title VII.[13]

In Bowie v. Ashcroft, 283 F. Supp, 2d 25 (D.D.C. 2003), the same magistrate who dismissed Ms. Martin's claims only a month later actually cited *Terry* with approval, holding that:

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[13] *Accord, Ruggieri v. Merit Systems Protection Board*, 455 F.3d 1323 (Fed. Cir. 2006) ("Whistleblower Act" retaliation claim upheld where employer cancelled a vacancy in order to prevent the plaintiff from being promoted into it).

> no particular type of personnel action [is] automatically excluded from serving as the basis of a cause of action under [Title VII]."

In *Mintz v. District of Columbia, 2006 U.S. Dist. LEXIS 34446 at *12-13* (D.D. C. 2006) the same court, *via* a different judge, upheld a plaintiff's Title VII retaliation claim where he alleged that his employer failed to convert his temporary status to a permanent employee status, in retaliation for his support of the original plaintiff. The district court decisions in *Mintz* and *Martin* are inconsistent, and will therefore cause confusion within the D.C. Circuit if not reconciled.

Mintz is consistent with all other circuit and district court decisions that have considered whether a non-renewal is actionable under Title VII. *Walker v. Board of Regents of University of Wisconsin System*, 300 F. Supp. 2d 836, 853 (W.D Wis. 2004), a case, like *Martin*, against a University with employees holding temporary and/or renewable contracts, held:

> Whether this action is considered a termination or a refusal to re-hire, I conclude that it is a cognizable injury for the purpose of § 1981, § 1983 and Title VII. Being denied a renewed contract is not a "minor or trivial" action. *Silk v. City of Chicago*, 194 F.3d 788, 800 (7th Cir.1999).[14]

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[14] *Walker* relied on the unanimous consensus of other jurisdictions on this issue, including *Carter v. University of Toledo*, 349 F.3d 269 (6th Cir.2003); *Fekade v. Lincoln University*, 167 F.Supp.2d 731, 739 (E.D.Pa.2001); *Lindblom*

If this high Court does not correct the errors of the D.C. Circuit court in this case, *Burlington* and even the D.C. Circuit's own pre-*Burlington* definition of actionable retaliation, will be substantially eviscerated.

III. The Tort of "Wrongful Discharge" Should Be Applied Where Employees Are Fired for Reporting Stalking and Other Violent Crimes

Amici expressly adopt Ms. Martin's argument in her Petition, at 36, relying on recent developments in the law of wrongful discharge. In *Franklin v. Monadnock Co.*, 151 Cal.App.4th 252 (Cal. 2007), the plaintiff alleged that he was fired for telling his employer and police that a co-worker who assaulted him threatened to have him and others killed. The Court found that the state's public policy interest in preventing crime, as well as violence in the workplace, created a wrongful discharge claim.

Franklin provides encouraging precedent for relief for stalking victims, in their workplaces and on campuses, in cases that do not meet the Title VII or Title IX[15] definitions of sex discrimination. Amici

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v. Challenger Day Program, Ltd., 37 F.Supp.2d 1109, 1116 (N.D.Ill.1999); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Trejo v. Shoben*, 319 F.3d 878 (7th Cir.2003); *Griffin v. Board of Regents of Regency Universities*, 795 F.2d 1281 (7th Cir.1986). *Minshall v. McGraw Hill Broadcasting, Inc.*, 323 F.3d 1273, 1280 (10th Cir.2003) (ADEA); *Day v. South Park Independent School District*, 768 F.2d 696 (5th Cir.1985) (§ 1983); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 50 F.Supp.2d 845, 851 (S.D.Ind.1999) (ADEA).

[15] Title IX of the Civil Rights Act of 1964 prohibits sex discrimination in education, paralleling Title VII, which prevents discrimination on the basis of sex, race, national origin and religion in employment.

urge the court to apply the *Franklin* rationale to the case at bar to provide an alternative theory of protection for victims of workplace and campus violence, violating both the ADEA and Title VII.

IV. Taxing Defendants' Costs to Appellant Will Have a Chilling Effect on Title VII Plaintiffs.

Amici urge this Court to reverse the district court's taxation of Howard University's costs to Prof. Martin. *NOW* has campaigned against the imposition of costs on good-faith civil rights plaintiffs[18] for the same reasons that costs should not be imposed upon Ms. Martin.

A woman who acts as a "private attorney general," in good faith, to eliminate sexual harassment in the workplace, should not be forced to pay the unpredictable litigation costs of a wealthy defendant simply because the court did not adopt her reasonable and well-grounded legal arguments.

This Court and others have said that trial judges must exercise restraint in assessing whether costs should be assessed against a non-prevailing party in "public law litigation" cases such as Title VII of the Civil Rights Act of 1964. *Crawford Fitting Co. v. Gibbons*, 482 U.S. 437 (1987); *Baez v. the United States*, 684 F.2d 999, 1003-1004, 1007 (D.C. Cir. 1982); *Pannonia Farms v. RE/Max International, Inc*, 2005 WL 3262902 at * 3 (D.D.C. 2005); *Summit v. Technology, Inc.* 435 F.3d 1371, 1374 (Fed. Cir. 2006); *Dual v. Cleland*, 79 F.R.D. 696, 697 (D.D.C. 1978). These courts were unwilling to "chill" the pursuit of the objectives of Title VII by

[18] NOW responded to the Eleventh Circuit's imposition of costs on plaintiff Lilly Ledbetter, after she lost her case on the merits before this high Court. *See Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007).

individuals who believed they were injured by illegal discrimination.

NOW and its sister *Amici* now urge this high Court to expressly adopt the *criteria* offered by other jurisdictions to prevent the unjust result imposed on Ms. Martin by the district court. In *County of Suffolk v. Secretary*, 76 F.R.D. 469 (E.D.N.Y. 1977), the court set forth factors to be considered in determining whether costs should be assessed against plaintiff in public law litigation:

1) whether the action was brought and carried forward in good faith; 2) whether the prosecution of the action provided direct benefits to the public; 3) whether the action resulted in direct or indirect benefit to the defendant; 4) whether novel and substantial issues of law or fact were resolved; 5) whether costs were required to reimburse needy defendants; 6) whether costs would unduly burden non-affluent plaintiffs; and 7) whether the imposition of costs would unduly inhibit future similar challenges.

The jury's factual findings in Prof. Martin's favor demonstrate her good faith in instituting and maintaining this lawsuit. The *Amici*'s participation further demonstrates that the issues she raised in this case are important issues of public policy. The district court's decision to impose Howard's costs on Prof. Martin sets precedent that unfairly burdens Title VII plaintiffs and chills the exercise of civil rights protections, and should be reversed.

CONCLUSION

Amici Curiae respectfully join Ms. Martin's Petition for Certiorari.

Respectfully Submitted,

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APPENDIX

Additional *Amici*

1) Peace at Work
P.O. Box. 41214
Raleigh, NC 27629

2) The Arizona Coalition against Domestic Violence
301 E. Bethany Home Road, Ste. C194
Phoenix, AZ 85012

3) Iowa Coalition against Domestic Violence
515 28th Street
Des Moines, IA 50312

4) Survivors in Action
P.O. Box 4584
El Dorado Hills, CA 95762

5) The Weaker Vessel
P.O. Box 2603
Gary, Indiana 46403

6) After the Trauma, Inc.
P.O. Box 1533
Clinton, MD 20735

7) California Protective Parents' Association
P.O. Box 15284
Sacramento, CA 95851

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(5)

Supreme Court, U.S.
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DEC 12 2008
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No. 08-204

In the Supreme Court of the United States

DAWN V. MARTIN, ESQUIRE
Petitioner

v.

HOWARD UNIVERSITY,
HOWARD UNIVERSITY LAW SCHOOL
and
ALICE GRESHAM BULLOCK, ESQUIRE
Respondents.

ON PETITION FOR WRIT OF *CERTIORIARI*
TO THE UNITED STATES COURT
OF APPEALS FOR THE D.C. CIRCUIT

PETITION FOR REHEARING

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QUESTIONS PRESENTED

1) Since 80% of stalking victims are women, should a disparate impact theory of discrimination be applied to find that workplace/campus stalking constitutes sexual harassment, pursuant to Title VII of the Civil Rights Act of 1964?

2) Where a woman is sexually harassed in her workplace by a non-employee, what "magic words" must she use in order to be protected from retaliation, as guided by EEOC Regulation 29 CFR § 1604.11(e)?

3) Must a plaintiff prove that she was "groped" or "touched" to prevail on a claim of sexual harassment?

4) Is harassment "based on sex" when the harasser uses gender-specific language, referring to the victim as his "*wife*?"

5) Where a stalker selects his *female* victim because she fits the "profile" of a fictitious *female* character, is the harassment "gender profiling," using a "sex-plus" analysis?

6) Where an employer cancels an advertised job vacancy, and leaves additional vacancies unfilled to avoid consideration of an applicant/employee who has complained of sexual harassment, does this conduct constitute actionable retaliation under Title VII, as defined by *Burlington Northern v. White*, 548 U.S. 53 (2006)?

7) Can a defendant escape liability in a Title VII retaliation case by admitting to *age discrimination* in its closing argument, without subjecting itself to a

claim under the Age Discrimination in Employment Act (ADEA)?

8) Under what circumstances should the court order a Title VII plaintiff to pay the litigation costs of the defendant?

9) Can a magistrate judge, *sua sponte*, dismiss a previously upheld claim where the Defendant never challenged the validity of that claim, as a matter of law?

10) Can the tort of "wrongful termination," in violation of public policy, be applied where an employee is terminated for reporting stalking in the workplace?

11) Can a plaintiff establish a claim of intentional infliction of emotional distress where an employer subjects her to a workplace stalker, lies about its efforts to ban the stalker from the workplace, and retaliates against the stalked employee by terminating her employment?

12) May a court place a decision on a plaintiff's motion for mandatory Rule 37 sanctions – in excess of $364,000 -- in indefinite abeyance and close the case without deciding it?

13) Where the court publishes a decision that relies on testimony that it ordered *excluded*, and that disputed testimony is harmful to plaintiff's professional reputation, may the court deny the plaintiff's *unopposed* motion to vacate it?

14) Does a court violate due process, the law of the case and/or Rule 56(d)(1) where it established facts and identified jury questions pre-trial, but post-trial, submitted a previously decided material question of fact to the jury?

15) Does a judge unduly prejudice a jury against a *pro se* party, by ordering her to talk to herself on the witness stand and speak of herself in the third-person, particularly where the court has excluded admissible evidence that would have enhanced her credibility?

16) Does perjury constitute a "fraud" upon the court and require vacating a jury verdict, pursuant to Rule 60(b)(2)?

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ARGUMENT

I. Rule 44 Standard for Rehearing

Petitioner respectfully requests rehearing on her *Petition for Writ of Certiorari*, which was denied on November 17, 2008. Pursuant to Rule 44, this *Petition for Rehearing* is limited to arguments based on intervening circumstances of substantial and controlling effect and to other substantial grounds not previously presented.

A new controlling Supreme Court decision presents an intervening circumstance justifying the grant of a rehearing. *See Zap v. United States,* 330 U. S. 800 (1947); *Bradley Mining Co., v. Boice,* 345 U. S. 932 (1953); *West v. Northwest Airlines, Inc.,* 505 U.S. 1201 (1992); and *Friend v. United States,* 517 U. S. 1152 (1996). The interest in finality of litigation must yield where the interests of justice would make the strict application of the rules unfair. *United States v. Ohio Power Company,* 353 U.S. 98, 99 (1957).

II. *Crawford v. Nashville* Constitutes an "Intervening Circumstance of Substantial and Controlling Effect" on *Martin*

This Court's forthcoming decision in *Crawford v. Metropolitan Government of Nashville and Davidson County*, 211 Fed. Appx. 373 (6th Cir. 2006), *cert. granted* by 128 S. Ct. 1118 (No. 06-1595) is an intervening circumstance of substantial and controlling effect in *Martin*. *Crawford is* another case similarly alleging sexual harassment and retaliation for reporting sexual harassment. Crawford requires that this Court further define "protected activity," within the meaning of Title VII of the Civil Rights Act of 1964.

The forthcoming decision in *Crawford* would

constitute controlling law in *Martin*, with respect to: 1) whether the question of "protected activity" is properly decided by a Court, as a matter of law, or submitted to a jury, as an issue of fact; and 2) the manner in which sexual harassment must be reported in order to constitute "protected activity."

Both Ms. Crawford and Prof. Martin reported their harassers' specific conduct to their employers. Ms. Crawford reported it during an internal investigation, in response to questions about whether a supervisor engaged in "inappropriate conduct." Prof. *Martin* complained verbally and wrote memoranda to her supervisor, then Law School Dean Alice Gresham Bullock. She entitled her memos "Security Problem on Campus," and referred to Harrison as a "stalker" after he was so characterized by the D.C. Metropolitan Police Department.

In both *Crawford* and *Martin*, the respective Circuit Courts held that the plaintiffs did not engage in "protected activity" because of *how* they reported the sexual harassment to their employers. Both Ms. Crawford and Prof. Martin lost their jobs shortly after reporting the harassment to their employers.

Ms. Crawford was terminated from her job after thirty years of employment. Despite student protests praising Prof. Martin's teaching ability and dedication to students, Howard refused to renew her teaching contract and left at least three faculty vacancies unfilled. Prof. Martin's previously glowing professional reputation was thereby tarnished in academia and elsewhere in the legal profession. This "non-renewal," the year before she would have been eligible for tenure, ended her career as a law professor and precluded her from returning to a position comparable to those she held during her

prestigious seventeen year legal career prior to being stalked.[1]

Both Ms. Crawford and Prof. Martin were deprived of the opportunity to prove that they lost their jobs due to retaliation for reporting the harassment. In Ms. Crawford's case, she was deprived of this opportunity at the summary judgment stage, based on the court's definition of "protected activity." In Prof. Martin's case, she was deprived of this opportunity at trial, where the court submitted the question of "protected activity" to a jury and failed to provide proper instruction on the legal analysis necessary to determine the issue.

A. *Crawford* will Determine whether the Trial Judge in *Martin* Erroneously Submitted the Question of "Legally Protected Activity" to a Jury

In 2006, when *Martin* finally went to trial, the jury determined that: 1) Harrison's harassment of Prof. Martin was severe and pervasive, creating a hostile work environment for her; 2) Harrison's conduct was unwelcome; 3) Howard administrators

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[1] Dawn Martin was a law professor at Howard University from July 1996 through June 1998 and at Cleveland State University from 1994-1996. She taught Equal Employment Opportunity (EEO) law and other courses for four years. Prior to teaching, she served as: 1) a trial attorney with the U.S. Department of Justice, Civil Rights Division (Honors Program); 2) the New York State Office of the Attorney General, Civil Rights Bureau; 3) Special Assistant to Commissioner Tucker at the Equal Employment Opportunity Commission (EEOC), helping to develop national policy; and 4) Assistant General Counsel for the D.C. Police Department. Prof. Martin published articles in the area of EEO law. She graduated from Columbia University (1978) and New York University School of Law (1981).

knew that Prof. Martin was being stalked by Harrison in her workplace; and 4) Howard failed to take reasonable steps to end the harassment -- or eliminate the hostile work environment. Jury Verdict, A-127; Pet. 10.

Based on the jury's factual findings, Ms. Martin was entitled to judgment, as a matter of law; however, Judge Hogan improperly charged the jury with the determining what conduct constitutes "protected activity"[2] (*see* Pet. at 19-20; A-129); however, the question of whether specific conduct constitutes "legally protected activity" is one of law for the courts – not a question of fact for the jury. *McFarland v. George Washington University*, 2007 WL 3284016 at 11 (D.C. 2007); *Howard University v. Green*, 652 A.2d 41, 45-47 (D.C. 1994); *EEOC v. PVNF, LLC*, 487 F.3d 790, 803-804 (10th Cir. 2007).

In *Crawford*, the lower courts decided the question of whether specific conduct constitutes "protected activity." No one appears to be arguing that this is a jury question; accordingly, this Court's forthcoming decision will presumably hold -- either expressly or implicitly -- that the question of whether conduct constitutes "protective activity" is a question for the courts -- not a jury. This decision will constitute controlling case law requiring reversal in *Martin*, since plaintiff lost the case only because the trial court submitted this question of law to the jury.

Howard repeatedly told the jury that Ms. Martin's claim must be defeated because she entitled her memos "Security Problem on Campus" rather than "Sexual Harassment;" yet, courts have long

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[2] As a part of that determination, he also charged the jury with determining whether Harrison's conduct constituted harassment on the basis of sex. (*See* A-127; Pet. 14-19)

recognized that stalking is one of the most egregious forms of sexual harassment.[3] Jurors should have been instructed that it is not necessary for a plaintiff to use the precise words "sexual harassment" to sustain her claim. Judge Hogan flatly refused to provide that instruction. Without the proper legal framework for analyzing harassment based on sex, jurors were confused into accepting Howard University's argument that the stalker's harassment was not sexual in nature or based on sex. The D.C. Circuit Court affirmed, without discussion of the applicable law. Those legal arguments compel reversal. Pet. at 19-23.

Crawford and *Martin* address different sides of the same coin, so to speak, with respect to reporting sexual harassment. In *Crawford*, the harasser was a supervisor. Ms. Crawford did not initiate a charge against this harasser supervisor, but rather, responded to an employer inquiry, during an internal investigation, when she was questioned about whether she witnessed this supervisor engage in "inappropriate conduct." In *Martin*, the harasser was a non-employee. The question is whether her requests for protection from this serial campus stalker constituted "protected activity."

B. *Crawford* will Determine whether "Magic Words" Must be Uttered to Invoke Title VII Protection against Retaliation

In *Crawford*, both sides agreed that no "magic words" are necessary to qualify it as "protected activity" when reporting conduct that constitutes sexual harassment. Tr. Oral Argument at 17, 29. Both the Solicitor General of the United States,

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[3] *See* Pet. at 21, fn. 18.

Amicus supporting Ms. Crawford, and Respondent agreed that the standard to be used is whether a reasonable person would infer that the employee opposes a practice made unlawful by the statute. *Id.*

Prof. Martin complained about a serial campus stalker, Leonard Harrison, who was roaming Howard Law School's buildings and other campuses, pursuing Prof. Martin and other African-American *female* professors to be his "wife." She attached copies of Harrison's handwritten letters to her and a transcript of his voicemail messages so stating. Harrison's letters included his confession that he had pursued numerous other women, in addition to her, searching for the physical embodiment of a fictional character in a book, written by renowned Prof. Derrick Bell. Harrison stated that he believed that the woman who served as the model for this fictional character was meant to be his "natural wife."

Under the standard advocated by both sides in *Crawford*, Prof. Martin's reports of stalking constitute "protected activity." The undisputed evidence demonstrated not only that a reasonable person *would* understand that Harrison's harassment was sexual in nature and/or based on her gender, but that the people she told *did, in fact,* understand it.

On November 20th and 21,st *all* persons whom she told about Harrison's stalking readily recognized that the Harrison was stalking her as a woman. These people included Howard administrators,[4] colleagues,[5] staff members[6] and law enforcement

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[4] Pl's Tr. Exhibit 8B (**JA**14,407); Tr. #490 at 50:5-51:4 (**JA**12,521-12,522).

[5] Tr. 1666:2-15 (**JA**12,460); Prof. Taslitz' comment that Prof. Martin would be "*raped* and killed" by Harrison if the

officers.[7] Indeed, in her July 1, 1999 to Howard's General Counsel, Dean Bullock admitted that she understood that Harrison was targeting *women* to "stalk" and "otherwise harass." (A-196)[8]

In 1999, Judge Hogan also understood. He held: *"it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female"* and that *Harrison "targeted women other than Plaintiff."* 1999 U.S. Dist. LEXIS 19516 at *11-12, 1999 WL 1295339; 81 Fair Empl. Prac. Cas. (BNA) 964; 15 I.E.R. Cas. (BNA) 1587 (D.D.C. 1999) (A-27). Rule 56(d)(1) required that this factual determination remain *"established through the action"* -- not re-litigated by a jury.

Seven years later, however, *after the trial*, Judge Hogan *abandoned* his own 1999 holding and submitted the question to the jury; moreover, he refused both the jury's and Ms. Martin's requests for more specific jury instructions on the definition of "sexual harassment" and harassment based on sex.

In 1999, Judge Hogan held: "There are no 'magic words' which must be chanted in order to invoke Title VII protection, *citing EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012-1013 (9th Cir. 1983). (A-28) He used examples of "protected activity" from *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025 (D. Nev. 1992). *Powell* held that the plaintiff had engaged in "protected activity" when she told her employer simply, "I don't have to

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matter were left up to campus security (*Id.*) even found its way into Prof. Martin's nightmares. Tr. #490 at 47:1-9 (**JA**12,518)

[6]Bruner depo at 137:4-13 (**JA**6,808).

[7]Sirleaf depo at 36:22-37:3 (**JA**6,658), 137:5-140:19 (**JA**6,698), 21:22-22:5 (**JA**6,652), 99:22-102:3 (**JA**6,683).

[8]Dean Bullock's trial testimony to the contrary constitutes perjury. See Pet. at 28; Reply Brief at 8-9.

take this" where her employer observed customer behavior that he should have recognized as sexual harassment. (A-28) Judge Hogan adopted *Powell*'s holding that a simple request to the employer to "do something" was enough to invoke Title VII. Similarly, Justice Stevens indicated that "get the hell out of my office" would be a sufficient response to sexual harassment to constitute an opposition to it. Tr. Oral Argument in Crawford, at 36. In 2006, however, Judge Hogan refused to instruct the jury that an employee is not required to use the words "sexual harassment" to invoke Title VII protection, thereby rendering his own 1999 meaningless.

If *Martin* is considered as a companion case to *Crawford,* or supplements *Crawford*, this Court would provide lower courts with a more comprehensive, or refined definition of "protected activity," whether the harasser is an employee or a non-employee in the workplace.

C. *Martin* would Supplement the *Crawford* Analysis by Addressing "Protected Activity" where the Harasser is a Non-Employee in the Workplace

In 1999, *Martin* set precedent in the D.C. Circuit, when district court adopted the Regulation of the U.S. Equal Employment Opportunity Commission (EEOC) Regulation, 29 C.F.R. § 1604.11(e) (A-21-22), holding that an employer is liable for the sexual harassment of an employee by a non-employee if it knew or should have known of the harassment, but failed to take reasonable steps to end it. *Martin v. Howard University,* 1999 U.S. Dist. LEXIS 19516 (A-17). No court has indicated that any particular procedure for reporting harassment by

a non-employee will -- or will not -- qualify as "protected activity" under Title VII.

Complaints about harassment by non-employees are not reported or remedied in the same manner as harassment by employees. It would be futile and illogical to file a formal sexual harassment complaint against a *non-employee*, with the EEO office of an employer that has no means by which to discipline the *non-employee*. The first step in taking "reasonable measures" to end workplace harassment by a *non-employee* is to ban the *non-employee* from the workplace. Prof. Martin reasonably entitled her memos "Security Problem on Campus"[9] because Harrison needed to be prevented from entering the law school buildings and particularly, her office.

III. The Court and the Public would Benefit from Consideration of the Arguments Made by NOW, NAWL and other Advocates for Women and Victims of Crime

The *National Organization for Women* (NOW), the *National Association of Women Lawyers* (NAWL) and the additional *Amici* stressed the national importance of protecting stalking victims against employer retaliation. These potential *Amici* filed a *Motion to Late File an Amicus Brief*, including the jointly filed *Amicus Brief*. NOW is the pre-eminent collective voice of, and advocate for, women in this country. NAWL speaks on behalf of women lawyers. Additional *Amici* speak for victims of domestic and/or workplace violence.

The *Amici* motion to late file was denied, so the Court did not consider the arguments made in

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[9]She *did* initially refer to Harrison's conduct as "sexual harassment." Bruner deposition at 137:4-13 (**JA**6,808).

their Brief; however, if rehearing is granted, the *Amici* will have an opportunity to resubmit these arguments in a Brief on the merits. In the interests of justice and of the people they represent, their voices should be heard in this case.

IV. Stalking in the Workplace is an Issue of National Importance

The issues raised in *Martin* are of national importance. It is particularly appropriate that this Court considers this *Petition* in January, which is *National Stalking Awareness Month. See* www.stalkingawarenessmonth.org, published by the *National Stalking Resource Center*. Stalking in the workplace is an issue of transcendental importance to women. Seventy-eight (78%) of stalking victims are women and 87% of stalkers are men.[10] Eight percent of all women in this country are stalked.[11] 54% of female murder victims reported their stalkers to the police before they were killed by their stalkers.[12] Stalking victims may be rendered unemployable, or under-employed, due to physical injury, mental/emotional injury, or simply due to employer retaliation against stalking victims.

This Court has never addressed the issue of workplace stalking, *per se*; however, Justice Ginsberg characterized Title VII as "a statute that's meant to govern the workplace with all its realities." Tr. Oral Argument in *Crawford*, at 39. Workplace

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[10] "Stalking in America: Findings from the National Violence Against Women Survey" (Washington, DC: National Institute of Justice, U.S. Department of Justice, 1998), 2, http://www.ncjrs.gov/pdffiles/169592.pdf.

[11] *Id.*

[12] The Stalking Resource Center, "Stalking Fact Sheet," www.ncvc.org/src.

stalking is a terrible reality for many women – and one that Title VII should address.

Despite the horrific consequences of stalking, there is no federal statute that *specifically* prohibits employers from retaliating against stalking victims; however, the long-established disparate impact theory holds that an sex discrimination is established where a practice disproportionately adversely affects members of one sex. *See Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977) (height and weight requirements) and *Oncale v. Sundower Offshore Services*, 523 U.S. 75, 118 (1998) (offensive conduct affected "*primarily* one sex).[13] The D.C. Circuit never even acknowledged the disparate impact arguments made by both Ms. Martin and *Amicus* NAWL – even though Judge Hogan acknowledged Ms. Martin's adverse impact argument in his 1999 decision. 1999 U.S. Dist. LEXIS 19516 at *10 (A-27).

Martin presents the classic example of stalking based on gender. The stalker targeted his victims based on the *profile* of fictional *female* character in a book. This "gender profiling" and his gender specific desire to make each stalking victim his "wife" necessarily required that he stalk *only women*. Pursuant to *Oncale*, where only members of one sex are subjected to a particular type of harassment, it is based on gender.[14]

Any woman may be stalked by an obsessed workplace stranger, while doing nothing more than "working while female." If *Martin* is not reversed, she will then be forced to choose between her job and

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[13] Pet. at 11-12, 23.

[14] The relationship of a husband and a wife is expected to include sex. Harrison's pursuit of Prof. Martin to be his "wife," was therefore also necessary "sexual in nature."

her safety. Women are reluctant to report sexual harassment, primarily for fear of losing their jobs. See *Amicus* Brief of the *National Women's Law Center, et al*, in *Crawford*, 4-25. If stalking victims are not protected from retaliation, they will be less likely to report the stalking to their employers. This failure to reporting stalking will hinder the employer's ability to secure the workplace and protect the stalking victim or other employees.

Martin now sets precedent holding that a woman can be stalked in her workplace and fired for reporting it. This Court has the power to reverse that holding and set precedent that furthers the Title VII purpose of eliminating sexual harassment in the workplace -- whether the harasser is an employee or a non-employee workplace stalker. This Court's reversal would serve the interests of justice, public safety and workplace equality.

CONCLUSION

Petitioner respectfully requests that that this Court grant Petitioner rehearing, considering this case consistently with *Crawford*.

Respectfully submitted,

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